TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 99.

CHARLES REITLER, PLAINTIFF IN ERROR,

vs.

WILLIAM A. HARRIS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JULY 26, 1909.

(21,763.)

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1 Be it remembered, That on the 14th day of May, 1908 there was duly filed in the office of the Clerk of the Supreme Court of the State of Kansas, a petition in error with a full and complete transcript of the proceedings of the district court attached thereto, and made a part thereof, which petition in error and transcript is in words and figures as follows towit:

In the Supreme Court of the State of Kansas, *ss:*

15992.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Petition in Error.

Filed May 14, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 15992.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Petition in Error.

Now comes Charles Reitler, plaintiff in error herein and complains of the said defendant in error for that:

On the 16th day of May, 1907, at a regular adjourned term of the district court of Edwards County, Kansas, in an action therein pending wherein the said Charles Reitler was plaintiff and the said William A. Harris defendant, said defendant in error by the consideration of said court obtained a judgment against this plain-
2 tiff in error, which said judgment and all the proceedings connected therewith more fully appear by the duly certified transcript of the record in said case which is hereto attached and marked "Exhibit A."

Plaintiff in error alleges that there was error in said record and proceedings in this:

That the court erred in making and entering the findings of fact contained in said record.

That the Court erred in his conclusions of law.

That the Court erred in overruling the motion of the plaintiff in error for a new trial.

That the Court erred in rendering judgment in favor of the said defendant in error and against this plaintiff in error.

Wherefore the plaintiff in error prays the consideration of this court and that the said cause be reversed and be remanded to the lower court with instructions to the said district court to enter judgment for this plaintiff in error as prayed for in his petition and against the defendant in error, and for such other relief as may seem proper.

F. DUMONT SMITH,
Attorney for Plaintiff in Error.

Filed May 14th, 1908.

D. A. VALENTINE,
Clerk Supreme Court.

3 In the District Court of Edwards County, Kansas.

CHARLES REITLER, Plaintiff,
vs.
WILLIAM A. HARRIS, Defendant.

Transcript.

EXHIBIT A.

4 In the District Court of Edwards County, Kansas.

Case No. 15992.

CHARLES REITLER, Plaintiff,
vs.
WILLIAM A. HARRIS, Defendant.

Petition.

Plaintiff compalains of defendant for that:

Plaintiff is the owner and entitled to the immediate possession of the North west quarter of Section 36, Township 26, Range 18 in Edwards County, Kansas; that the said defendant unlawfully detains possession of the same from this plaintiff and has so unlawfully detained the same from this plaintiff for more than two years.

That plaintiff has been damaged by said unlawful detention in the sum of $500.00.

Wherefore plaintiff prays judgment for the possession of said land and the sum of $500.00 as damages, for costs of suit and such other and further relief as may to the court seem proper.

(Signed) F. DUMONT SMITH,
F. L. SLAUGHTER,
Atty's for Plaintiff.

STATE OF KANSAS,
Edwards County, ss:

The Clerk of said court will issue summons to the defendant above named, directed to the sheriff of Edwards County, returnable ac-

cording to law. Amount claimed, possession of land and $500.00 damages.

F. D. SMITH,
Atty's for Plaintiff.

(Endorsed:) Chas. Reitler vs. Wm. A. Harris, Petition and Precipe. Filed January 19, 1907. H. J. Wilson, C. D. C.

5 In the District Court of Edwards County, Kansas.

CHARLES REITLER, Plaintiff,
vs.
WM. A. HARRIS, Defendant.

Answer.

Comes now the defendant in the above entitled action and for answer to plaintiff's petition filed therein, says that he denies each and every, all and singular the allegations and averments in said petition contained, and denies generally that plaintiff has any title whatever to the real estate described in his petition.

(Signed) L. M. DAY,
A. C. DYER,
Atty's for Defendant.

(Endorsed:) Chas. Reitler vs. Wm. A. Harris, Defendant's Answer. Filed Feb. 20th, 1907. H. J. Wilson, C. D. C.

6 In the District Court of Edwards County, Kansas.

CHARLES REITLER, Plaintiff,
vs.
WILLIAM A. HARRIS, Defendant.

Affidavit for Continuance.

STATE OF KANSAS,
Edwards County, ss:

William A. Harris, being first duly sworn, deposes and says that he is the defendant above named, that one F. S. Avery was the sheriff of Edwards County, Kansas, during the year 1901, and was the officer who served the notice of forfeiture issued by the County Clerk of said county by which the certificate of purchase theretofore issued to one David Thompkins, and at that time owned and held by the plaintiff was sought to be cancelled.

That said Avery was formerly a resident of this county, but removed therefrom several years ago, and took up his residence at a place unknown to defendant; that defendant has made diligent effort to ascertain the place of residence of the said Avery ever since the commencement of this suit, in this towit: that he and his attor-

neys have inquired of all persons likely to know his place of residence and have been unable to ascertain the same until about four days ago, and too late to take his deposition for use at the trial of this case at the April, 1907, term thereof.

That about four days ago the defendant learned that the present residence of the said Avery is at Orwell in Ashtabula County, Ohio, and defendant will be able to take his deposition at that place prior to and in time for use in his behalf at the next term of this court.

That the said Avery will testify in said cause as follows:

7 My name is F. S. Avery. I reside at Orwell, Ashtabula County, Ohio; I was formerly a resident of Edwards County, Kansas, and was for five years the sheriff of that County, and was such sheriff during the year 1901.

On July 13, 1901, there was issued to me as such sheriff, by the County Clerk of said County, a notice, a copy of which is attached hereto, and marked "Exhibit A," that I served said notice at the time and in the manner as shown by my return on the back thereof.

That at that time I was well acquainted with Charles Reitler the plaintiff in this case, and had known him for more than fifteen years; that said Reitler was at that time a resident of Chicago, Ills., and had been for more than ten years prior thereto, and was not at that time a resident of Edwards County, Kansas, and was at the time said notice was issued and up until the time the same was returned, and long thereafter, absent from said county of Edwards, all of which facts were to me well known at the time said notice was issued to me to be served, and at the time of my return thereon.

Affiant further says that he believes the said witness Avery will prove the foregoing facts, and that he (affiant) believes them to be true.

(Signed) WILLIAM A. HARRIS.

Subscribed and sworn to before me this 2nd day of April, 1907.

H. J. WILSON,
Clerk of Dist. Court.

(Endorsed:) No. 2378. Chas. Reitler vs. Wm. A. Harris. Affidavit for Continuance. Filed April 2nd, 1907. H. J. Wilson, C. D. C.

8 *Notice to Defaulting Purchasers of State School Land.*

To Charles Reitler.

DEAR SIR: As the purchaser or the assignee of the original purchaser of the North West quarter of section 36, township 26, range 18 of the Sixth P. M., state of Kansas, said land being State School Land purchased from the state of Kansas, you are hereby notified that the sum of — Dollars as principal, and the further sum of Fifty One Dollars as annual interest is due and remains unpaid upon the purchase price of the land hereinbefore described, and that you are in default in the payment of the sum due as aforesaid.

Therefore, you are hereby notified that if you fail to pay or cause

to be paid the amounts due as aforesaid, together with the costs of issuing and serving this notice, within sixty days from the date of the service hereof, you, the said purchaser, or the assignee of the original purchaser, and all persons claiming under you, will absolutely forfeit all right and interest in and to such land under said purchaser, and an action will be brought to eject you, and all persons claiming under you, from the possession of said land.

Given under my hand and the official seal of Edwards County, this 13th day of July, A. D., 1901.

(Signed) ALBERT F. ADERHOLD,
[SEAL.] *County Clerk.*

(Endorsed:) Notice to Defaulting Purchasers of State School Land. Received this notice this 13th day of July, 1901 and served the same by leaving a copy with C. C. Potter, who occupies the within premises. July 17th, 1901. F. S. Avery, Sheriff. Costs. Sheriff's costs $4.60. County Clerk's costs 25 cents.

9 THE STATE OF KANSAS,
County of Edwards:

In the District Court, Sitting in and for the County of Edwards, in the State of Kansas.

CHAS. REITLER, Plaintiff,
vs.
WM. A. HARRIS, Defendant.

Now comes the plaintiff and moves the court for a new trial of the above entitled cause for the following reasons towit:

That the verdict report decision is not sustained by sufficient evidence and is contrary to law.

Error of law occurring at the trial and excepted to at the time by said plaintiff.

NOTE.—Affidavits and other evidence will be used on the hearing of said motion.

F. D. SMITH,
Att'y for Plaintiff.

(Endorsed:) Motion for New Trial. Chas. Reitler, Plaintiff vs. Wm. A. Harris, Defendant. Filed May 16th, 1907. H. J. Wilson, C. D. C.

10 In the District Court of Edwards County, Kansas.

CHARLES REITLER, Plaintiff,
vs.
WILLIAM A. HARRIS, Defendant.

Journal Entry.

Be it remembered that on this — day of April, 1907, this cause came on to be heard, plaintiff present by his attorney F. Dumont Smith, defendant present in person and by his attorneys A. C. Dyer and L. M. Day. And thereupon and on the same day parties in open court waived a jury and agreed that said cause should be tried by the court, and the court having heard the evidence in said cause and the argument of counsel, doth take the same under advisement until the regularly adjourned term of said court to be holden on May 16, 1907.

And thereupon, on May 16, 1907, at an adjourned day of the regular April, 1907 term of said court, parties present as before, the court having been duly advised doth find for the defendant herein, makes and files the following findings of fact and conclusions of law herein.

Findings of Fact.

First. That on September 2, 1886, David Thompson duly made final proof on the land in controversy, towit, the Northwest quarter of section 36, township 26, range 18, in Edwards County, Kansas, and was duly declared the purchaser thereof, at the appraised price of $3 an acre, and the said Thompson duly made his first payment thereon on September 2, 1886 of $48 and duly received the school land certificate therefor.

Second. On March 2, 1888, the said David Thompson, a single man, duly assigned said school land certificate and all his rights thereunder to John W. Berry; that on March 21st, 1888 John W. Berry and —— Berry, his wife, duly assigned said school land
11 certificate and all their rights thereunder to Charles Reitler, the plaintiff in this case, for the sum of $1200.00.

Third. That thereafter the said Charles Reitler made due payments of interest and taxes on said land until November 22, 1898, but made no payments thereafter until Sept. 22, 1906, at which time the said Charles Reitler made payment of principal and interest then due in the sum of $432.00, and then paid taxes and interest thereon in the sum of $207.36, the same being the payment of taxes and interest required to pay out on said land at that date in full and then and there received a final receipt therefor.

Fifth. That on the 26th day of September, 1906, the said Charles Reitler having presented his school land certificate as aforesaid on said land, showing full payment of principal and interest thereon and the taxes thereon to said date, the Governor of said state did,

on the 26th day of September, 1906, issue to the said plaintiff, Charles Reitler, a patent for said land of said date, duly attested by the Secretary of State, of the State of Kansas, under the hand and seal of the said Governor and the Secretary of State, which said patent was duly recorded by Seth G. Wells, register of the state land office, in volume 27, at page 35, and thereafter duly recorded by the register of deeds in Edwards County, Kansas on the 6th day of December, 1906, in book of deeds at page 163, and entered in the transfer record of said county by the County Clerk thereof on the 14th day of December, A. D. 1906.

Sixth. That on January 19th, 1907, plaintiff commenced his action in ejectment against the defendant, William A. Harris, alleging that he was the owner and entitled to the immediate possession of the north west quarter of section 36, Township 26, range 18 in Edwards County, Kansas, a formal petition in ejectment. That on Feb. 20th, 1907, the defendant filed his answer by his attorneys, L. M. Day and A. C. Dyer in said action, in which he denied each, every, all and singular the allegations and averments in said petition contained, and that the said cause was tried upon the said petition and answer.

12 Seventh. That the said plaintiff having failed to make the payment of interest and taxes after Nov. 22, 1898, as aforesaid, the clerk of Edwards County, did, on July 13, 1901, duly issue a notice as and to the said Charles Reitler as a defaulting purchaser of said school land, which said notice set forth that the said Charles Reitler as the assignee of the original purchaser of the Northwest quarter of section 36, township 26, range 18, Edwards County, Kansas, being state school land purchased from the state of Kansas, was then in default in the sum of $51.84 as annual interest; that therefore if the said Charles Reitler failed to pay or cause to be paid the amount due as aforesaid, together with the costs of issuing and serving this notice within 60 days from the date of the service thereof, that the rights of the said Charles Reitler would be forfeited, which said notice was duly given under the hand and official seal of Albert Aderhold, the then County Clerk of Edwards County, Kansas on July 13, 1901.

Eighth. The said notice duly came into the hands of F. S. Avery, the then duly elected and acting sheriff of Edwards County, Kansas. That at said time the said Charles Reitler to the knowledge of said Avery, sheriff, was a non-resident of and absent from the state of Kansas, and had so been a non-resident and absent from the state of Kansas for more than 10 years prior to that time. That the said sheriff made the following returns upon said notice towit: "Received this notice this 13th day of July, 1901, and served the same by leaving a copy with C. C. Potter who occupied the within premises July 17, 1907. F. S. Avery, Sheriff. Costs, Sheriff's costs $4.60; County Clerk's costs $.25; total $4.85. That on July 17, 1901, a copy of said notice was duly posted in the office of the County Clerk of Edwards County, Kansas. That after the expiration of 60 days from the attempted service of said notice as aforesaid, the County

Clerk of said County entered upon his school land record of said County the following notation. "Land forfeited."

Ninth. That from about the year 1893 until the time that
13 Silas Potter settled upon said land, the said land was vacant as to improvements, not cultivated or tilled and had no improvements thereon, except such as were accidentally placed thereon by C. C. Potter. That the said Charles Reitler committed no physical act of abandonment as to said land that the said land was in the same condition as to improvem-nts and occupancy from about the year 1893 until the said Silas Potter settled thereon, except as to the house placed thereon as shown in finding No. 11, and that Chas. Reitler never resided thereon.

Tenth. That the only act of abandonment committed by the said plaintiff was his failure to pay any installments of interest and taxes on said land as herein recited.

Eleventh. That some time prior to the year 1901, C. C. Potter, a brother of Silas Potter had moved a house onto said land, supposing it was on the North east quarter of the same section; that later it was discovered that the said house was on the North west quarter. That in the Fall of 1901, and after the attempted forfeiture of said land, one Silas Potter learned from the County Clerk of the facts about the forfeiture as aforesaid, and having bought the said house of C. C. Potter, and relying on the said attempted forfeiture filed on the said land, mov*ing* into the said house, and continued to occupy the same until he sold the same to the defendant. The said Silas Potter built a barn on said premises, dug two wells, broke out 18 acres and built some fence on it, and thereafter made final proof on his settlement before the probate judge of Edwards County, Kansas and received a school land certificate of purchase therefore and duly made payment of interest and taxes up to the time of the commencement of this suit. Said certificate of purchase was dated on or about the 29th day of March, 1902.

Twelfth. That the said Silas Potter bought the said land at the appraised price of $200 for the quarter section.

14 Thirteenth. That in the spring of 1904, said Silas Potter sold his right, title and interest in the land and the improvements thereon to the defendant William A. Harris, for the sum of $1,320, paid to the said Potter by the said Harris, and duly assigned the certificate of purchase as aforesaid to the said Harris. That at that time the improvements consisted of a house, two wells, barn, a milk house, one windmill, 80 acres fenced and the breaking.

Fourteenth. That the defendant Harris purchased the rights of the said Silas Potter on the faith of the attempted forfeiture hereinbefore recited, and that the said Harris has ever since held possession of the said land and occupied the same as his home and now occupies it.

Fifteenth. That at the time the said Charles Reitler ceased to pay interest on his school land certificates and the taxes on the land in the year 1898, said land had very little market value and was not worth to exceed $150. And at the time the said Silas Potter settled

on said land and purchased the same from the state of Kansas, it was worth about the sum of $200. That at the time the said Charles Reitler paid the balance of the principal and interest due on his certificate of purchase on the 22nd day of September, 1906, said land was reasonably worth the sum of $1600 and the value of the improvements made by the defendant Harris and Silas Potter on said land was $600.

Sixteenth. That at the time the said plaintiff quit paying interest on said school land in 1898 and at the time the same was purchased by Silas Potter as a settler, said Charles Reitler had a local agent residing in Edwards County, Kansas, one H. C. Bingham. That said Reitler knew the value of said lands during all of said years, and either had knowledge and information that said school land certificate of purchase had been forfeited and that the said Silas Potter had settled upon and improved said land as a settler
15 thereon and knew that Potter was making valuable and lasting improvements on said land, or might by the exercise of ordinary care have acquired all of such knowledge. That said Reitler did not in any way object to such settlement and improvement of said land and did nothing to prevent the same and did not in any way object to or protest against the forfeiture of said school land certificate.

Seventeenth. That when said Silas Potter entered upon said land as a settler in September, 1901 said land was unimproved and he lived thereon and made improvements thereon until the 2nd day of February, 1904, and during all of his occupancy of said land no one objected to his settlement, improvement or purchase of said land.

Eighteenth. The said defendant, William A. Harris, on or about the 2nd day of February, 1904, purchased said land from said Silas Potter, paying him therefor the sum of $1320 in cash and assuming the balance of the principal and interest due the state of Kansas, being $180, the principal. That the value of the improvements would figure out $620.00 and the value of Potter's interest in the land $700.00. That at the time of defendant's said purchase said Potter relied upon the legality of the purchase of said land by said Silas Potter. That since his purchase of said land said defendant has added lasting improvements valued at $—.

I conclude that the notations on the record of the County
16 Clerk prove prima facie a due and regular forfeiture of the certificate under which plaintiff held, which proof has not been overcome.

I conclude that the abandonment of the land by Reitler, his acqu-escence in the forfeiture; in the possession of the subsequent purchaser for the period necessary to give him a settler's right to purchase, his failure to protest against the subsequent sale, were sufficient to lead the subsequent purchaser to believe he was accepting such forfeiture as sufficient and binding, and that he is now estopped from complaining of irregularities in the forfeiture proceedings against a purchaser in good faith on the strength of

such proceedings and especially against a person who, like the defendant, has paid a large sum for the assignment of the certificate and for which he could have no relief were he dispossessed of the land.

17 To each and every, all and singular of which findings of fact and conclusions of law, so as aforesaid by the court made and entered and each and every part thereof the plaintiff then and there duly excepted and his exception was allowed.

And thereupon and on the same day and before the adjournment of court the defendant duly filed his motion for a new trial herein and thereupon and on the same day the said motion for a new trial came on to be heard, parties present as before, and the court having heard the same and being fully advised doth overrule said motion for a new trial, to which ruling the plaintiff then and there duly excepted and his exception was allowed.

That thereupon the court doth render judgment for the said defendant and against the plaintiff.

Wherefore it is considered, ordered and adjudged that the defendant have and recover from the plaintiff his costs expended herein taxed at $—, to which judgment the plaintiff then and there duly excepted and his exception was allowed.

(Signed) C. E. LOBDELL,
Judge of the 33d District.

Filed this 12th day of May, 1908.
[SEAL.] H. J. WILSON,
Clk Dist. Court, Edwards Co., Kansas.

18 STATE OF KANSAS,
Edwards County, ss:

I, H. J. Wilson, Clerk of the District Court of Edwards County, Kansas, do hereby certify that the foregoing is a full, true and correct transcript of the record in the above entitled cause.

In testimony whereof I have hereunto set my hand and official seal this 12th day of May, 1908.
[SEAL.] H. J. WILSON,
District Clerk of Edwards Co., Kans.

19 Be it further remembered, that on the 14th day of May, 1908, there was filed in the office of the Clerk of the Supreme Court of the state of Kansas, a waiver of the issuance and service of a summons in error, which waiver, and all of the indorsements thereon *is* in words and figures as follows towit:

In the Supreme Court of the State of Kansas.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Waiver of Summons in Error.

Comes now the said defendant in error, by his counsel, and waives the issuance and service of a summons in error, in the above entitled cause, and enters his appearance therein.

Dated this — day of May, 1908.

L. M. DAY,
Attorney for Defendant in Error.

(Endorsed:) No. 15992. Charles Reitler vs. William A. Harris. Filed May —, 1908. D. A. Valentine, Clerk Supreme Court.

20 Be it further remembered, that on the — day of April, 1909, the same being one of the regular judicial days of the January, 1909, term of the Supreme Court of the State of Kansas, the said court being in session in its court room in the City of Topeka, the following proceedings were had and entered of record, towit:

21 In the Supreme Court of the State of Kansas, Saturday, May 8, 1909.

No. 15992.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Journal Entry of Decision.

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiff in error pay the costs of this case in this court taxed at $— and hereof let execution issue.

22 Be it further remembered, that on the — day of May, 1909, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas the syllabus and opinion of the said Supreme Court in this cause, which syllabus and opinion are in words and figures as follows towit:

23 No. 15992.

CHARLES REITLER
vs.
WILLIAM A. HARRIS.

Error from Edwards County.

Affirmed.
Syllabus by the Court.

SMITH, *J.:*

1. Under the facts found in this case there is no element of estoppel as against the plaintiff below.
2. The decision of Jones v. Hickey, just decided, as to the competency of the legislature to provide what shall be prima facie evidence of the legal service of a notice, is followed.
All the Justices concurring.

A True copy.
Attest:

[SEAL. D. A. VALENTINE,
Clerk Supreme Court.

24 *Statement of Facts.*

This action was brought by the plaintiff in error January 18, 1907, to recover from the defendant 160 acres of land in Edwards County, the title and right of possession to which he claimed under a school land patent from the state. The defendant answered by general denial. The case was tried to the court. Judgment was rendered in favor of the defendant. Findings of fact and conclusions of law were made which, so far as material, are, in substance, as follows. (1) David Thompson on September 2, 1886 purchased the land at the appraised price of $3.00 per acre, made first payment of $48.00 and received the school land certificate of purchase therefor. (2) On March 2, 1886, Thompson assigned his certificate to one Berry and on March 21, 1888, Berry and wife reassigned the same to plaintiff, Charles Reitler, for $1200. (3) Reitler made the interest payments and taxes due on the land up to Nov. 22, 1898, but made no other payments until Sept. 22, 1906, when he paid the full amount of principal and interest then due, being $432; also taxes on the land and interest thereon amounting to $207.36 and received final receipts therefor. (5) On Sept. 26, 1906, on presentation of such certificate he received a patent in due form for the land from the state. (7) On July 13, 1901, the county clerk of Edwards County issued to Reitler a notice that he was in default for non-payment of interest in the sum of $51.84 and that if the same was not paid within sixty days from the service of the notice his rights to the land would be forfeited. (8) This notice was delivered to the sheriff of the county who made the following return thereon, "Received this notice this 13th

day of July, 1901 and served the same by leaving a copy with C. C. Potter who occupied the premises July 17, 1901. F. S. Avery, Sheriff." That at that time Reitler to the knowledge of the sheriff was a non-resident and absent from the state of Kansas and had been for more than ten years prior thereto. That a copy of the notice was duly posted in the office of the County Clerk July 17, 1901. That after the expiration of sixty days from the attempted service
25 of the notice the County Clerk entered upon his school land record of the County the following notation: "Land forfeited." (9) That Reitler never resided upon the land and never had any portion thereof cultivated after the year 1893. (10) The only act of abandonment committed by Reitler was his failure to pay interest installments and taxes on the land. (11) In the fall of 1901, Silas Potter learned of the attempted forfeiture and settled upon the land, bought a house which had been moved thereon by mistake; built a barn; dug two wells; broke out eighteen acres and built some fence on the premises and thereafter made proof of his settlement before the probate judge and received a school land certificate of purchase therefor about March 29, 1902. He duly made payment of interest and taxes up to the time of the commencement of this action. (12) Potter bought the land at the appraised price of $200. (13) In the spring of 1904 the defendant, Harris, bought the assignment of Potter's certificate for $1320. The improvements on the land at that time consisted of a house, two wells, barn, milk house, one wind mill, eighty acres fenced and the breaking. (14) The defendant has had possession of the land and occupied it as his home from the time he purchased the certificate until the time of trial.

Finding No. 16 copied in full, reads as follows:

"Sixteenth. That at the time the said plaintiff quit paying interest on said school land in 1898 and at the time the same was purchased by Silas Potter as a settler, said Charles Reitler had a local agent residing in Edwards County, Kansas, one H. C. Bingham. That said Reitler knew the value of said lands during all of said years, and either had knowledge and information that said school land certificate of purchase had been forfeited and that the said Silas Potter had settled upon and improved said land as a settler thereon and knew that Potter was making valuable and lasting improvements on said land, or might by the exercise of ordinary care have acquired all of such knowledge. That said Reitler did not in any way object to such settlement and improvement of said land and did nothing to
26 prevent the same and did not in any way object to or protest against the forfeiture of said school land certificate."

Finding No. 18, in substance, is as follows: at the time Harris bought the certificate from Potter for $1320 the value of the improvements was $620, the value of Potter's interest in the land $700.

27 The opinion of the court was delivered by

SMITH, *J.*:

Upon these facts the court based two conclusions of law, the second of which we will first consider. It is, that on the facts found the plaintiff "is estopped from complaining of irregularities in the for-

feiture proceedings against a purchaser in good faith on the strength of such proceedings and especially against a person who, like the defendant, paid a large sum for the assignment of the certificate."

In all this there is no element of estoppel as has in effect been held in every case of defective service of the notice of forfeiture in the numerous cases in this court from Knott v. Tade, 58 Kan. 94 to Hickert v. Doran, 76 Kan. 674, and Spencer v. Smith 74 Kan. 142. In those cases the authorities are reviewed.

Even applying the new rule of evidence to the forfeiture proceedings there is no evidence that Reitler had any actual knowledge. He was absent from the state and personal service of the notice upon him was not possible hence there could have been only constructive service by posting the notice. There can be no estoppel except actual knowledge of the facts from which it arises be shown.

On the other hand, the records of the county clerk's office through which they were attempting to acquire rights to the land, were open to the defendant and his grantor. It would seem that ordinary care and prudence would have led to an examination thereof and that in the absence of such care they might be held to have knowledge of whatever the records would have disclosed to them. They are presumed to have known the law and under the then law the sheriff's return upon the notice conclusively showed that Reitler's rights to the land had not been legally forfeited.

Burgess v. Hickson, 75 Kan. 201, is the leading case relating to school lands wherein the doctrine of estoppel is applied against the first purchaser or his grantor. In that case Burgess had the land in question therein included within the fence of his ranch for six years, then leased it and occupied it as a tenant of the state for four
28 and one-half years; thus treating Walton's right to the land as forfeited by the state for many years after the proceedings to enforce the forfeiture. He then suffered Hickson to buy the land, make a payment on it, take possession and spend money in its improvement, and thereafter procured a quit claim deed from the original purchaser, Walton, and attempted to set up his claim as the assignee of Walton against Hickson. Burgess in that case, at first by his action in holding the land as public land and afterwards by leasing it of the state and later by remaining silent while Hickson bought the land, took possession of it, and spent his money in improving it, led Hickson to the belief that Walton's right to the land was cancelled and therefore sought to take advantage of Hickson's ignorance of the situation. In short, that case contained every element of estoppel in pais as usually defined and bears no analogy to the present case.

The court finds that Reitler had an agent in the county and knew or could have known in the exercise of diligence what Harris and his grantor were doing in the way of improving the land from 1902 to 1906. The court, however, does not find that the agency had anything whatever to do with the land in question and while a principal may be presumed to know what his agent knows in regard thereto when the agent is conducting the business of the principal, there is no presumption that the principal knows what the agent knows about other matters. The court expressly finds, in substance, that Reitler

had no personal knowledge of these matters in finding that he had been a non-resident of and absent from the state for more than ten years.

The first conclusion of law, however, is unassailable. It is practically conceded that if Section 1, Chapter 373, Laws of 1907, is constitutional and valid, it determines the controversy in the case. The court finds that the county clerk of the county, after the expiration of sixty days from the attempted service of the notice, did enter upon his school land record this notation: "Land forfeited." Section 1, supra, provides, in substance, that such an entry "shall be
29 prima facie evidence, in any action or proceeding in any court in this state, that proper notice of the purchaser's default had been issued and legal notice thereof made, and that all things necessary to be done as conditions precedent to the forfeiture of the right and interest of the purchaser, and all persons claiming under him in and to such land, had been duly and properly done and performed, and that such forfeiture had been duly declared."

It has just been decided in No. 16765, Jones v. Hickey, "— that it was competent for the legislature to provide what shall be prima facie evidence of legal service, and that this provision of the act is not objectionable on the ground that it disturbs vested rights."

The plaintiff contends that, as he had fully paid for the land and obtained his patent from the state, his rights thereto were determined before the commencement of this action and before the passage of Chapter 373, Laws of 1907.

In the absence of fraud this may be true as between Reitler and the state but as between the parties the issuance of the patent to Reitler is no higher and greater evidence of his right to the land than is the ownership of the school land sale certificate by Harris of his right thereto. The question that determined their right is, *what* the service of the notice of forfeiture legally made upon Reitler? Before the enactment of this statute the return of the sheriff upon the notice was held to be the exclusive evidence as to whether the service was legally made and the return in this case was insufficient to prove that fact. The statute provides that the notation made by the county clerk is prima facie evidence of legal service and the "trial court found that there was not sufficient evidence to rebut this prima facie evidence and the plaintiff does not even contend that there is such evidence."

It was competent for the legislature to provide the rule of evidence and where there is conflicting evidence upon a fact at issue the findings of the trial court thereon cannot be disturbed here. Petersilie vs. McLachlin, — Kan. — (Just decided).

30 If the equities of the plaintiff in this case be superior to those of the defendant, if he has, in addition to large amounts of interest and taxes, paid to the state as the price of the land more than twice the amount the defendant is to pay and at a time when by the then law of the state and rule of evidence he had only to pay for the improvements made by the occupying claimant to entitle him to the full possession and title to the land, if instead he stands to lose nearly $1,900 and gets nothing in return,

even if the defendant, when he acquired his certificate and went into possession, had presumptive notice that the plaintiff's rights had not been legally forfeited and could still be asserted, even if the situation be such that many similar cases are likely to arise, none of these considerations are to govern this or any other court of the state. The legislature in enacting the law is presumed to have anticipated such contingencies and still, for some greater good to the state at large, to have provided the new rule of evidence; that if the county clerk should have made certain notations (which no statute had made it his duty to make) upon the school land records of his county, such notations should be prima facie evidence in any proceeding in any court of the state, of a number of facts which may or may not have been within the knowledge of the clerk at the time he made the notation.

It is not our duty to reform or to criticise the statute but it is our duty to follow it unless repugnant to a higher law in which case it is not law.

This judgment is affirmed.

All the Justices concurring.

A true copy.
Attest:

D. A. VALENTINE,
Clerk Supreme Court.

31 Be it further remembered, That on the 19th day of May, 1909, there was filed in the office of the Clerk of the Supreme Court of the State of Kansas, the petition of plaintiff in error, for a rehearing, which said petition was in words and figures as follows towit:

32 Filed May 19, 1909. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of Kansas.

Case No. 15992.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendants in Error.

Petition for Rehearing.

Now comes the said plaintiff in error and petitions the court to grant a rehearing of the above entitled action for the following reasons towit:

First. The court failed to consider and pass upon the question raised by the plaintiff in error in his brief; that the Act of 1907 is in violation of Article 1, Section 10 of the Constitution of the United States.

Second. The court failed to consider and pass upon the ques-

tion raised by plaintiff in error in his brief that the Act of 1907 has no application to the case at bar, because it was passed after the suit was commenced in this case in the court below, and could not be retroactive so as to effect suits then pending.

Third. Because the court failed to consider and pass upon the question raised by the plaintiff in error in his brief that the prima facie evidence of the notation on the Clerk's docket was rebutted by the plaintiff in error by a proof of the sheriff's return, and for the further reason that neither the sheriff's return, nor any oral evidence showed that the notice had been served "on all persons in possession of the land", nor did the court find anywhere that service had been so made, and that therefore regardless of the Act of 1907 the forfeiture was void.

33 The decision of the court herein having eliminated the question of estoppel, narrows the case materially and affirms the judgment of the lower court solely by the authority of the Act of 1907.

1. I submit that the court wholly failed to consider or pass upon the federal question squarely raised in our brief, that the Act of 1907 is in conflict with Article 1, Section 10 of the Constitution of the United States.

On this point I call the court's attention to pages 9 to 12 inclusive, of my reply brief. In addition I call the court's particular attention to the following cases cited by me at the hearing; Walker vs. Whitehead, 16 Wallace 314 U. S. where it is said:

1. The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which effect its validity, construction discharge and performance.

2. "The ideas of validity and remedy are inseparable, both are parts of the obligation which is guaranteed by the Constitution against impairment."

3. "The state may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the Act in question, to that extent it is void."

Also Pennoyer vs. McConnaughy 140 U. S. 1. A swamp land case precisely like the one at bar. Also Gelpecke vs. Dubuque 1st Wallace 175. In which it is said: "If the contract when made was valid by the laws of the state as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law."

34 Apply these decisions to the case at bar Reitler's contract with the state was made under a certain law, which was written into his contract. Relying upon the decisions of this court through a period of more than thirty years, that his contract could only be forfeited in a certain way, he paid a large sum of money to the state in the fulfilment of his contract, secured his patent and brought suit in ejectment. Now can the legislature or this court after all that has been done, destroy his contract, by

changing the law which was a part of his contract, or changing the decisions of this court? The Supreme Court of the United States has said no, in emphatic terms over and over again. It therefore seemed to me proper to once more submit this question to the court unembarrassed by other questions or considerations. If the court should still uphold the Act of 1907, it would leave the federal question clear cut with no other ground for the decision than the constitutionality of this Act.

Second. If, however, it be conceded that Sec. 1 of the Act of 1907 might be valid as to future suits, it must be remembered that this action was commenced on January 19th, 1907. The Act in question took effect January 25th, 1907. The rights of the parties were fixed and date from the commencement of this suit. The legislature might change the rules of evidence as to future suits, but it may not change them as to pending or past litigations. A. & E. pp. 1037-1050.

Third. Conceding the validity of Sec. 1 of the Act of 1907 and its application to the case at bar, the court still overlooked the material contention raised by us in our brief. It will be conceded that even under the Act of 1907 and the decision just pronounced in this case, before the forfeiture of Reitler's rights could be held valid, it must be shown in some way that the notice of forfeiture was served as required by the statute. In other words, it must be served "on all persons in possession of the land." That rule has not been changed. On pages 1, 2, 3, and 4 of our reply brief, we raise this question which the court has overlooked. I will go back to it again.

It is apparent that the purpose of the Act of 1907 was to cover the many cases where the sheriff's return and all records of the forfeiture have been lost and nothing remains to prove the forfeiture but the notation on the Clerk's docket. The preamble of the Act and its context fully show this to be the purpose. Section- 1 and 2, expressly confine the effect of this notation to prima facie evidence. This court in Petersillie vs. McLachlin decided at the May term, held Section 3 invalid because it attempted to make the posting of the notice conclusive evidence of the validity of the forfeiture. Thus the Claimants under a new purchase could show the notation on the Clerk's docket and rest on that as having made prima facie evidence of a valid forfeiture. The old purchaser could rebut this by introducing the sheriff's return, if any existed. If not, by oral proof that no service was ever had. If the sheriff's return failed to recite proper service, then if the Act is valid, the new purchaser might rebut the sheriff's return by showing that the sheriff did in fact make such a service, though he fails in his return to so state. In Jones vs. Hickey, this was what happened: "The sheriff's return was defective in failing to state that no one was in possession of the land. The plaintiff supplied the omissions in the recitals of the return by offering oral proof that the land had never been occupied by any one." If such proof had been offered in the case at bar, the point that I am endeavoring to make would be of no avail. That is what distinguishes this case from Jones vs. Hickey.

In the absence of the sheriff's return, it being the duty of the Clerk to file the notice, then it might well be said that the Clerk's notation of a forfeiture would be prima facie evidence that the lost return showed a legal forfeiture but where the sheriff's return is in existence, and offered in evidence the notation of the Clerk which was based on that return could not have any weight as against
36 the return itself. The sheriff knew the facts recited in his return; the Clerk knows only what the return says, and it would be the height of absurdity to have the Clerk's notation made upon hearsay, over-ride the original instrument itself, upon which his notation is based. If the return is in existence, it must be said, not only logically, but from the preamble and context of this Act, that the notation ceases to have any effect as evidence. The case would stand solely upon the sheriff's return, were it not for the further provision of Section 2, that oral evidence may be introduced to prove a valid service. But if a valid service is to be proven by oral evidence it must prove all the facts that the sheriff's return should show, that is the oral evidence should show exactly what this court has always required the sheriff's return to show, i. e., a service complying strictly with the statute. It would seem then that in order to establish a forfeiture by oral evidence the evidence adduced and the facts found by the court must be exactly the same as are required to make a valid return by the sheriff. I shall show later that that was not done in this case. What I have said with regard to the notation on the Clerk's docket, applies with equal force to the posting of the notice. If the notice was posted as required by law, the most that this statute makes of that fact is prima facie proof of a valid service. Certainly it cannot be contended that where the statute under which Reitler bought required personal service upon him if he could be found in the county and upon all persons in possession of the land, that thereafter that statute could be so changed in prejudice of his rights as to base a valid forfeiture upon a mere posting of the notice. If the statute attempted to do this it absolutely failed. But this provision undoubtedly has the same force as that regarding the notation on the Clerk's docket. Without any other evidence, it would end the matter. When the sheriff's return is shown and that return fails to show the proper steps, then it devolves upon his who asserts the forfeiture, to show by legal evidence that due service was made, though not returned.

37 When the defendant offered in evidence the notation on the Clerk's docket, the most that that proved was a prima facie case. What does that mean? Simply that in the absence of any other evidence the court would presume the forfeiture valid.

We rebutted this prima facie evidence by the introduction of the sheriff's return, which shows that the service is absolutely invalid for the reason that it did not recite that Reitler was not in the county and did not recite that the sheriff left a copy of the notice with all of the persons in possession of the premises. 8th finding, page 4, abstract.

The defendant supplied the first omission by proving that Reitler was a non-resident of the county, and was not in the county when the notice was served. To that extent he sustained the burden cast upon him by our production of the sheriff's return. But he did not offer evidence, or show that C. C. Potter was the only person in possession of the premises. No proof was offered on that point, and the court did not find that C. C. Potter was the only person in possession of the premises. The court in its opinion says "the statute provides that the notation made by the County Clerk is prima facie evidence of legal service, and the trial court found that there was not sufficient evidence to rebut this prima facie evidence, and the plaintiff does not even contend that there is such evidence." With all due respect to the court we do and did contend just that. We contend on pages 1, 2, 3, and 4 of our reply brief, that our production of the sheriff's return completely rebutted and overthrew the prima facie evidence of the notation on the Clerk's record. To make out a valid forfeiture, they then proceeded to show by oral evidence over our objection that Reitler was out of the county, but they offered absolutely no proof, and there is not a scintilla of evidence in the record that Potter was the only person occupying the land. We having made a prima facie case of an invalid forfeiture by the production of the very
38 instrument upon which the validity of the forfeiture depended, certainly the burden was then thrown upon the defendant to show orally or somehow that the sheriff did in fact comply with all of the requirements of the statute, though he did not in terms say so; that no such evidence as to the possession of the premises was adduced, is shown by the fact that the court in his findings entirely ignores this question except so far as it is shown by the sheriff's return.

In Phares vs. Gleason, 73 Kan. 604, the service was exactly like the one at bar, and the court held the forfeiture invalid. In this case not only the return, but the proof is silent as to whom else was in possession of this land. All there is before this court is the special findings of the court below. The judgment must stand or fall on them. The court found erroneously that there was a prima facie showing of a forfeiture. This is a conclusion of law. The facts that he found did not show a prima facie forfeiture or any forfeiture at all. If the court had added to his voluminous finding one sentence, towit: That C. C. Potter was the only one in possession of said land at the time the sheriff's notice was served, this point would be covered, but the court failed to find it, because there was no evidence on that point. Therefore his findings failed to support his judgment and the case should be reversed for that reason alone, conceding everything else. We submit that this point was nowhere passed upon by the court *it* its opinion, except in the phrase which we have quoted from the opinion, which is clearly erroneous.

All of which is respectfully submitted.

F. DUMONT SMITH,
Attorney for Plaintiff in Error.

That thereafter and on June 12, 1909, the following proceedings were had in said cause in said court:

In the Supreme Court of the State of Kansas, Saturday, June 12, 1909.

No. 15992.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Journal Entry Denying Petition for a Rehearing.

Now comes on for decision the Petition for a rehearing of this cause. And thereupon, it is ordered and adjudged that said Petition for a rehearing be denied.

SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of said court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Charles Reitler, Plaintiff in error, vs. William A. Harris, defendant in error, and also of the syllabus and opinion of the court rendered therein, as the same now appears on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 9th day of July, A. D. 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Here follows, the original petition for a writ of error, the original assignments of error, the original writ of error, and the original citation showing service upon L. M. Day, attorney of record herein for the defendant in error:

In the Supreme Court of the State of Kansas.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Petition for Writ of Error.

To the honorable judges of the Supreme Court of the United States:

Charles Reitler, the above named plaintiff in error, considering himself aggrieved by the final decision of the Supreme Court of the state of Kansas, in rendering judgment against him in the

above entitled case hereby prays a writ of error from the decision and judgment to the Supreme Court of the United States, and an order fixing the amount of a supersedeas bond.

And your petitioner, the said Charles Reitler, plaintiff in error in the above entitled action, would most respectfully represent as follows:

That in a certain action of law tried and determined at the April, 1907, term of the District Court of Edwards County, Kansas, wherein said above named plaintiff in error was plaintiff, and said above named defendant in error was defendant, a judgment was rendered in favor of said defendant and against said plaintiff.

That thereupon certain proceedings in error were therein instituted to the Supreme Court of Kansas, wherein said plaintiff below became plaintiff in error, and said defendant below become defendant in error.

That in the issues presented by said cause and in the argument and presentation made in said courts by the said plaintiff it was alleged that a certain statute of the state of Kansas, towit: Chapter 373 of the Session Laws of 1907 and each and every part of
44 it was in violation of that part of the Constitution of the United States, which prohibits any state from passing any law impairing the obligations of contract; that thereafter and at the May term of said Supreme Court for the year 1909 said judgment so rendered by the District Court of Edwards County, was by the said Supreme Court affirmed, and said statute was held not to be in conflict with the Constitution of the United States, and the said statute of the state of Kansas was held to be valid and binding on the courts and that by reason of the said statute, the judgment of the court below was proper, and the said judgment of the lower court affirmed.

That thereafter and within the time limited by law, said plaintiff in error duly filed in said Supreme Court his petition for rehearing of said cause and at the June, 1909, term of said court said petition was by said Supreme Court denied.

Your petitioner further represents that there are manifest errors in the record and proceedings in said cause in said Court, which your petitioner desires to be by your honors examined, corrected and adjudged what of right, according to the laws and customs of the United States, should be done therein in the premises.

And accordingly your petitioner prays that your honors will grant, issue, and award a writ of error out of this honorable court, directed to the honorable judges of the Supreme Court of Kansas, commanding them to send to your honorable court the record and proceedings aforesaid, with all things concerning the same, together with said writ of error, that your honorable court may examine and consider the same and pronounce judgment therein as in the judgment of your honorable court is right and proper in the case, and that you issue a citation to said defendant in error, William A. Harris and allow to this plaintiff in error a supersedeas.

F. DUMONT SMITH,
Attorney for Plaintiff in Error.

[Endorsed:] 15992. Chas. Reitler v. Wm. A. Harris. Petition for Writ of Error. Filed Jul- 1, 1909. D. A. Valentine, Clerk Supreme Court.

45 In the Supreme Court of the State of Kansas.

CHARLES REITLER, Plaintiff in Error,
vs.
WILLIAM A. HARRIS, Defendant in Error.

Assignment of Errors.

Comes now the above named plaintiff in error, Charles Reitler and says that there is error in the record and proceedings of the supreme court of Kansas, in the above entitled action, and for the purpose of having the same reviewed in the supreme court of the United States, he makes the following statement and assignment of errors.

First. The court erred in holding that Chapter 373 of the Session Laws of 1907 is not in violation of that part of the Constitution of the United States which prohibits any state from passing any law impairing the obligation of contracts, as was alleged, argued and presented by plaintiff in error.

Second. The court erred in holding that said Chapter 373 Laws of 1907 should be applied to an action commenced before the passage of said act and that so applying said act, and thereby defeating this plaintiff's right to recover, did not affect vested rights, and did not impair the obligation of plaintiff's contract contrary to that part of the Constitution of the United States before mentioned.

Third. That the plaintiff in error relied upon a manifold line of decisions of the Supreme Court in the State of Kansas interpreting school land contracts made between the state of Kansas and purchasers thereof, and complied fully and absolutely with the terms of his said contract according to the decisions of said court and the said state of Kansas having accepted the payment of the plaintiff
46 in error for said land duly issued to him a patent therefor, assigned by the Governor of said state. That the supreme court of the state of Kansas erred in holding and adjudging that the said state of Kansas could thereafter pass any law purporting to change certain rules of evidence, but which in effect changed the contract theretofore made between the said state of Kansas and the plaintiff in error, so as to void and invalidate said contract, and that by reason of said consideration, the court erred in holding that the said statute of the state of Kansas was not in violation of that part of the constitution of the United States which prohibits any state in passing any law impairing the obligation of contracts.

Fourth. The court erred in affirming the judgment of the district court of Edwards County, Kansas, rendered in favor of said defendant below upon the trial of this action.

Fifth. The court erred in denying the petition for a rehearing filed in said supreme court of Kansas in this action by said plaintiff in error.

Wherefore, said plaintiff in error prays that the supreme court of the United States may reverse and vacate the judgment so rendered in this action by the supreme court of the state of Kansas, and that plaintiff in error be restored to all things which he has lost thereby.

F. DUMONT SMITH,
Attorney for Plaintiff in Error.

[Endorsed:] 15992. Chas. Reitler v. Wm. A. Harris. Assignments of Error. Filed Jul- 1, 1909. D. A. Valentine, Clerk Supreme Court.

47 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the honorable the Judges of the Supreme Court of Kansas, Greeting:

Because in the record and proceedings, also in the rendition of the judgment of a plea which is in the said supreme court of Kansas, before you or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between Charles Reitler, plaintiff in error vs. William A. Harris, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein, was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute or commission, a manifest error hath happened, to the great damage of the said Charles Reitler, plaintiff in error, above named, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the
48 same in the said Supreme Court at Washington, within 60 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the

United States, the 1st day of July, in the year of our Lord one thousand nine hundred and nine.

GEO. F. SHARITT,
Clerk of the Circuit Court United States, District of Kansas.

[The Seal of the Circuit Court of the United States, District of Kansas. 1862.]

Allowed by—
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 15992. Chas. Reitler v. Wm. A. Harris. Writ of Error. Filed Jul- 1, 1909. D. A. Valentine, Clerk Supreme Court.

49 UNITED STATES OF AMERICA, *ss:*

To William A. Harris, Greeting:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Kansas, wherein Charles Reitler is plaintiff in error and you are defendant in error; to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why *a* speedy justice should not be done to the parties in that behalf.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of Kansas.

In the year of our Lord One Thousand Nine Hundred Nine.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

July 1st, 1909.

[Seal Supreme Court, State of Kansas.]

Attest:

D. A. VALENTINE,
Clerk Supreme Court of Kansas.
By H. L. ARMSTRONG,
Deputy.

[Endorsed:] 15992. Chas. Reitler v. Wm. Harris. Citation. July 8, 1909, received this writ. July 8, 1909, served the same by delivering copy to L. M. Day for Wm. A. Harris. J. W. Moorhead, Sheriff. Sheriff's fees, $1.00. Original.

50 SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, Clerk of the supreme court of Kansas, do hereby certify that there was lodged with me as such clerk on July 1st, 1909, in the matter of Charles Reitler, Plaintiff in error, vs. William A. Harris, defendant in error,

Two copies of the writ of error, as herein set forth, one for the defendant in error and one to file in my office.

In testimony where, I have hereunto set my hand and affixed the seal of said court at my office in Topeka, Kansas, this 9th day of July 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

51 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ of error, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name, and affix the seal of said Supreme Court of Kansas, in the City of Topeka, this 9th day of July 1909.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

52 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to William A. Harris, Greeting:—

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, within sixty days from the date hereof, pursuant to a writ of error filed in the office of the Clerk of the Supreme Court of Kansas, wherein Charles Reitler is plaintiff in error and you are defendant in error; to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable W. A. Johnston, Chief Justice of the Supreme Court of Kansas this 1st day of July A. D. 1909.

W. A. JOHNSTON,
Chief Justice of the Supreme Court of Kansas.

[Seal Supreme Court, State of Kansas.]

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas,
By H. L. ARMSTRONG,
Deputy.

GREENSBURG, KANSAS, *July* 20, 1909.

I, Attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation.

L. M. DAY,
Attorney for William A. Harris.

53 STATE OF KANSAS,
—— *County, ss:*

—— ——, of lawful age, being first duly sworn, on oath deposes and says:—

I was duly authorized and deputized by Hon. W. A. Johnston, Chief Justice of the Supreme Court of the State of Kansas, to serve upon the defendant in error the citation hereto attached. I served the same by delivering personally to —— ——, defendant in error, (or) to —— ——, attorney of record for Wm. A. Harris, a true and certified copy of said citation with all endorsements thereon at ——, Kansas, on July —, 1909, at — o'clock — m.

—— ——.

Subscribed and sworn to before me this — day of July, 1909.

—— ——.

Mileage.
Service.

[Endorsed:] 15992. Chas. Reitler v. Wm. A. Harris. Citation. Filed July 22, 1909. D. A. Valentine, Clerk Supreme Court.

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In the Supreme Court of the United States.

CHARLES REITLER,
Plaintiff in Error,

vs.

WM. A. HARRIS,
Defendant in Error.

No. 29

BRIEF OF DEFENDANT IN ERROR.

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In the Supreme Court of the United States.

CHARLES REITLER,
Plaintiff in Error,

vs.

WM. A. HARRIS,
Defendant in Error.

No. 99

STATEMENT.

This is an ejectment action between two individuals for the possession of a tract of land that is known in Kansas as school land. On September 2, 1886, David Thompson purchased from the State of Kansas the land in controversy for the sum of $480.00 paying at that time $48.00 in cash and agreeing to pay the balance within twenty years, with 6 per cent annual in-

terest, payable annually, and received a certificate of purchase embodying his contract to pay the balance and annual interest. This certificate of purchase was assigned and finally became the property of the plaintiff in error, and he made payments of the annual interest till November 22, 1898, then defaulted thereafter, on the 13th day of July, 1901, the clerk of Edwards County, Kansas, being the county where said lands were located, issued a notice as required by law, directed to the sheriff of Edwards County, Kansas, commanding him to notify Charles Reitler of his default in the payment of the interest, and that if he failed to pay the interest within sixty days from the date of service of the notice, his rights to the land would be forfeited. This notice was served on July 13, 1901, by delivering a copy of the notice to C. C. Potter, who occupied the land at that time. Also a copy of the notice was posted up in the office of the county clerk of Edwards County, Kansas. The finding of the court was that Charles Reitler was a non-resident of Kansas and was absent therefrom, which was personally known to the sheriff; that after sixty days from the time the notice was posted in the office of the county clerk, the county clerk entered in the School Land Sales Records in his office concerning this land, the notation "Land Forfeited."

In the fall of 1901, one Silas Potter settled on this land, after the expiration of sixty days from the time

of the service of the forfeiture notice, under the school land laws as a settler, and on the 29th day of March, 1902, the same land was resold to Potter by the State of Kansas and a certificate of purchase issued to him. That this certificate of purchase Potter sold and assigned to the defendant in error in February 1904, for the sum of $1600, paying the sum of $1320 cash and assuming the balance of $180, due the state, and at that time the possession of the land was delivered by Potter to the defendant, who moved thereon, and has been living there ever since, with his family, and he has paid annually each installment of interest and taxes on the land, and has improved the land to the extent of about $620.00.

On September 1906, plaintiff in error paid to the State of Kansas, the balance of the principal and interest on the Thompson certificate of purchase, and received a patent therefor. On the 19th day of January 1907, Reitler began this action in the District Court of Edwards County, Kansas, against the defendant in error, for the possession of said land, both parties claiming the land, the plaintiff under the Thompson sale and the defendant under the Potter certificate. The District Court of Edwards County, Kansas, and the Kansas Supreme Court, held that the proof of the service of the notice of the forfeiture of the plaintiff's interest was sufficient to show that the title of plaintiff in error was forfeited, and that he obtained no

rights as against the defendant by afterwards paying the balance due on his certificate of purchase and procuring a patent.

The only question then is, were the forfeiture proceedings, as against the plaintiff, legal, and are the rights of the plaintiff barred thereby?

ARGUMENT.

Sec. 2, Chapter 161, Laws of 1879 (Kansas) which is copied on page 9 and 10 of *plaintiff in error's brief*, says how the forfeiture notice shall be served, as follows:

"The notice above provided for shall be served by the sheriff of the county by delivering a copy thereof to such purchaser *if found in the county, also to all persons in possession of said land;* and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk."

On January 25, 1907, Chapter 373, Laws of 1907, took effect, after the plaintiff had made his payment of the balance of his certificate of purchase, and after he had received his patent, and after the plaintiff had commenced this action, but before the case was tried in Edwards County District Court, the material part of which is as follows:

"Section 1. Where entries which appear upon the records of school land sales, or of school land sale certificates, in the office of the county clerk of any county

in this state, and purporting or shown to have been made in the usual course of the business of that office, indicate that the interest of the purchaser in the tract of land, in connection with which said entries were made had been forfeited, or default in the payment of money due the state on such purchase, and such land was thereafter sold to a new purchaser, such entries shall be *prima facie* evidence, in any action or proceeding in any court of this state, that proper notice of the purchaser's default had been issued and legal service thereof made, and that all things necessary to be done as conditions precedent to the forfeiture of the right and interest of the purchaser, and all persons claiming under him in and to such land, had been duly and properly done and performed and that such forfeiture had been duly declared. Any entry upon said records of the county clerk as 'cancelled,' 'forfeited,' 'reverted to state,' 'state' and the like, with or without date, shall be held to be an entry indicating that the interest of the purchaser had been forfeited."

Also the latter part of Section 2 provides:

"In any case where the sheriff's return fails to show legal service, parol and other evidence may be introduced to prove that in fact legal service of the notice was made."

Up to the time of the passage of Chap. 373, Laws of 1907, the sheriff's return on the forfeiture notice was conclusive evidence on the question of the validity of the forfeiture proceedings. This was not a statutory rule, but was one laid down by the courts of the state.

(See cases cited by plaintiff in error on pages 16, 17 and 18 of his brief.)

The reason of the rule is stated by the Kansas Supreme Court in the case of *Jones vs. Kickey*, 80 Kansas, 109, 114, as follows:

"The principles underlying the former decisions is that, as forfeitures are not favor, the original purchaser cannot be deprived of his vested rights in the land except upon a showing of strict compliance with all statutory requirements; therefore no presumption of regularity in the acts of the officers should be indulged for the purpose of establishing a forfeiture, and the written returns and records could not be amended by parol proof. It cannot be doubted that it was within the power of the Legislature to change the rule of evidence and declare what shall constitute a *prima facie* showing of legal service of the notice." (*Mo. Pac. Rly. Co. vs. Merrill*, 40, 404; *The State vs. Sheppard*, 64 Kansas, 451.)

The effect of Chapter 373, of Laws of 1907, was to change the rule of evidence; it does not change the contract, or the remedy, but makes certain facts *prima facie* evidence of the regularity of the forfeiture proceeding.

FORFEITURE.

Counsel for plaintiff in error claims, that the forfeiture was void for the reason that the return failed to show, that Reitler was not in Edwards County; that

the sheriff served the notice on all persons in possession of the land, and that the notice was not posted in a "conspicuous place." This contention would be good, if it were not for said Chapter 373, Laws of 1907. Finding No. 8 of the trial court (Transcript of Record, p. 7), shows that the notice was issued, and that Reitler was a non-resident and absent from Kansas, and that the notice was served on C. C. Potter the occupant of the land, and that a notice was on the 17th day of July, 1901, posted in the office of the county clerk, and that the county clerk after the expiration of sixty days from that time entered upon the school land record in his office the notation "land forfeited."

This, under said law, was a *prima facie* showing that all steps had been taken to cancel the plaintiff's interest in the land. It was then incumbent upon the plaintiff to show that the notice was not in fact served according to law. He did not do so, and the trial court found that this *prima facie* showing was not overcome and held that the entry was properly cancelled. To relieve himself of the default in not paying the interest as it became due from year to year and from the forfeiture, the plaintiff attacks said Chapter 373 of the Laws of 1907, claims it to be void, in that it attempts to impair the obligation of contract, and contravenes Article one, Section ten of the Federal Constitution.

"By the obligation of a contract is meant the means, which at the time of its creation, the law affords for its enforcement."

(*Louisiana vs. Police Jury*, 111 U. S. 716.)

"What is it then, which constitutes the obligation of a contract?

The answer is given by the chief justice, in the case of *Sturges vs. Crowningshield*, to which I readily assent now, as I did then; it is the law which binds the parties to the performance of their agreement. The law then, which has its binding obligation, must govern and control the contract in every shape in which it is intended to bear upon it, whether it affects its validity, construction or discharge."

(*Ogden vs. Saunders*, 12 Wheat. 213, 257.)

In what way does the Act of 1907, impair the obligation of the contract of purchase of the school land, held by plaintiff in error?

Counsel for plaintiff in error on page 25 of his brief says:

"In the case at bar the state bound itself to convey this land to Reitler whenever he complied with his part of the contract regardless of any default on his part unless predicated upon such default, his rights had been forfeited in the manner provided by law. No such forfeiture had occurred. That must be conceded. The state recognized this when it took his money and issued the patent. Having done this can the state retroactively change the remedy, validate a forfeiture, con-

cededly void, and thus deprive him of the land which he has bought and to which the state has given him title?"

If this were a controversy between Reitler on the one hand and the State of Kansas, on the other, there would be great weight to the argument, but the rights of the defendant in error are to be considered. The state may waive a forfeiture, as against itself, but cannot do so when private interests have attached. The findings of the lower court are: That no interest was paid by Reitler, on his contract of purchase, after November 22, 1898, till September 22, 1906, nearly eight years (Transcript of Record, p. 6); that on July 13, 1901, a notice was issued and served as provided by the statute, except that the sheriff's return did not show fully the manner of the service, but the court found that the service was valid under the law of 1907. After the expiration of sixty days from the time of this service, the county clerk entered in the book of sales in his office where the record of this sale was kept the words "land forfeited." After this was done, the state sold the land to the grantor of the defendant in error, on the 29th day of March, 1902. (11th Finding Transcript, p. 8.) The plaintiff in error then on the 22nd day of September 1906, paid to the state the balance due on his certificate of purchase and received a patent from the state. The officers of the state who received the money and issued the patent were mere

ministerial officers, without any authority to waive the forfeiture. The enactment of the law of 1907 does not in any way change the law of 1879, which was in force when the land was sold to Reitler's grantors. The same notice and the same manner of service of the notice is required since the law of 1907, as before. The law of 1907 does not dispense with the notice of default, and that it shall be served "by the sheriff of the county by delivering a copy to such purchaser, if found in the county, also to all persons in possession of such land, and if the purchaser cannot be found, and no person is in possession, of said land, then by posting the same up in a conspicuous place in the office of the county clerk." Under the law of 1907, unless it is found that the notice has been issued, in case of a default, and has been served in accordance with the above, there will be no forfeiture. The only difference is that the burden of the proof is shifted to the one claiming under the first purchase to show that the notice was not issued, or that it was not served as the law required. The fact that the clerk marked his record "land forfeited" or the like, is *prima facie* evidence, of the legal forfeiture, casting the burden of proof on the first purchaser. He is not shut out by this law from showing that the forfeiture was not made. It amounts only to a change of the rule of evidence. It is not in any sense an impairment of the obligations of a contract. The authorities cited by

counsel for plaintiff in error have no application to the case at bar.

LEGISLATURE MAY CHANGE RULE OF EVIDENCE.

Cooley's Constitutional Limitations, p. 452 (5th ed.) says:

"It must also be evident that a right to have one's controversies determined by existing rules of evidence is not a vested right. These rules pertain to the remedies which the state provides for its citizens; and generally in legal contemplation they neither enter into and constitute a part of any contract, nor can be regarded as being of the essence of any right which a party may seek to enforce. Like other rules affecting the remedy, they must therefore at all times be subject to modification and control by the Legislature; and the changes which are enacted may lawfully be made applicable to existing causes of actions, even in these states in which retrospective laws are forbidden."

1 Elliott on Evidence, Section 86, lays down the rule thus:

"The Legislature has power and authority over rules and regulations affecting the remedy, and may change the burden of proof either directly by expressly providing that it shall rest upon the one party, or indirectly by creating a rebuttable presumption of law making one fact *prima facie* evidence of another."

The Supreme Court of Indiana, in the case of *State vs. Beach*, 36 L. R. A. 179, 182, states the doctrine as follows:

"We think it clear that the Legislature has the

power to prescribe rules of evidence and methods of proof. A law which would in effect, exclude the evidence of a party, and thereby deny him the right to be heard, would deprive him of due process of law. A law which provides that certain facts are conclusive proofs of guilt would be unconstitutional, as also would one which makes an act *prima facie* evidence of crime which has no relation to a criminal act, and no tendency whatever to establish a criminal act. If, however, the Legislature in prescribing the rules of evidence in any class of cases, leaves a party a fair opportunity to establish his case or defense and give in evidence to the court or jury all of the facts legitimately bearing on the issues in the case to be considered and weighed by the tribunal trying the same, such acts of the Legislature are not unconstitutional. It has repeatedly been held that the Legislature has the right to declare what shall be presumptive or *prima facie* evidence of any fact."

This doctrine is recognized in the following cases and states:

Morgan vs. State, 117 Ind. 569;
State vs. Sattley, 131 Mo. 464;
Howard vs. Mott, 64 N. Y. 262;
Holmes vs. Hunt, 122 Mass. 505;
Wright vs. Dunham, 13 Mich. 414;
Gage vs. Caraher, 125 Ill., 447;
Robertson vs. People, 20 Colo. 279;
Saunders vs. Greenstreet, 23 Kan. 425;
Harris vs. Harsch, 29 Or. 562;
Robeson vs. Brown, 63 N. C. 554;
Ehle vs. Brown, 31 Wis. 405;
Irwin vs. Pierro, 44 Minn. 490 (47 N. W. 154);
Northern Liberties vs. St. John's Church, 13 Pa. St. 104.

The case of *Sanders vs. Greenstreet, supra,* was one in ejectment brought by the heirs to recover land which had been sold at administrator's sale. The sale and deed were in 1865, under the law of 1859, and the deed was not in conformity to that law and therefore worthless as evidence. The law then in force provided that the deed should recite the order of sale, while the deed only recited that the probate court ordered the administrator to sell. In 1868 the law was changed, so that the deed should refer to the order of sale by its date and the court by which it was made, and shall convey to the purchaser all the right, title and interest of the deceased. The deed plainly met all of the requirements of the law of 1868, but not of the law in force when it was made. In 1872 a statute was passed making all deeds of real estate made by executors or administrators prior to the general statutes of 1868 which conformed to the requirements of the law of 1868, *prima facie* evidence of the regularity of the proceedings notwithstanding the omission of recitals required by former laws. The court in passing on the question says:

"This statute fits this case exactly Conceding the defect in the deed under the Statute of 1859, it is beyond doubt complete and sufficient under the law of 1869. The only question therefore is, as to the power of the Legislature thus to modify a matter of evidence, and of the power of the Legislature in this respect we have no doubt. Reason and authority both

uphold it. It will be noticed that no attempt is made to declare an incomplete deed, conclusive evidence. Any such statute may be open to question."

There are many more Kansas authorities, including the case at bar, in which this doctrine is recognized and applied.

This doctrine has been recognized and applied by the Supreme Court of the United States, in the following cases, among others:

Marx vs. Hanthorn, 148 U. S. 172 (13 Supreme Court Rep'r 508);
Mo., etc., Ry. vs. Haber, 169 U. S. 636 (42 L. 879);
Fong Yue Ting vs. United States, 140 U. S. 729 (37 L. Ed 916);
Li Sing vs. United States, 180 U. S. 493.

In the case of *Railway vs. Haber*, 189 U. S. 636, a Kansas statute providing that in the trial of any civil action under the statute, proof that cattle were brought into the state south of the thirty-seventh parallel of north latitude should be *prima facie* evidence that they were, between the first day of February and the first day of December, capable of communicating Texas fever, and that the owner or person in charge had full notice thereof, does not deny any right secured by the Federal Constitution. In the case of *Fong You Ting vs. United States, supra*, the Chinese Exclusion Act required all Chinamen laborers within one year to

have a certificate of his residence, and in case he had no such certificate it required him to prove "by at least one credible white witness, that he was a resident of the United States at the time of the passage of the act." The court said, it "is within the acknowledged power of every Legislature to prescribe the evidence which shall be received and the effect of that evidence, in the courts of its own government."

NEW RULES OF EVIDENCE APPLY TO EXISTING CAUSES OF ACTION.

Counsel for plaintiff in error contends that the statute of 1907 cannot apply to Reitler's contract, because he had paid the balance due the state and received his patent before the act was passed, and had commenced his suit against Harris for the possession of the land. It is a sufficient answer to this, to say that the law of 1907 was in force when the action against Harris was tried in the Edwards County Court. If, as a fact, the forfeiture notice was issued and it has been served in the manner pointed out by the statute, even though the sheriff's return did not show it, then the interest of Reitler ceased in that land, after sixty days from such service, and a subsequent payment of the default of the defaulted interest and principal, to the state, would not set aside that forfeiture as against the defendant in error Harris, who holds under a second purchase from the state. As against

the state, it may waive a forfeiture, but when third parties interest intervene, it cannot do so. The court finds that the evidence introduced does not prove that the notice was not issued, or was not properly served, and that the *prima facie* showing which the notation on the record imports, was not overcome by the plaintiff. The authorities are unanimous, that the change in the rule of evidence will apply to existing causes of action when the change is made.

Cooley's Constitutional Limitations, p. 452 (5th Ed.) says:

"for the law as changed would only prescribe rules for presenting the evidence in legal controversies in the future; and it would not therefore be called retrospective even though some of the controversies upon which it may act were in progress before. It has accordingly been held in New Hampshire that a statute which removed the disqualification of interest, and allowed parties to suits to testify, might lawfully apply to existing causes of action. (*Rich vs. Flanders*, 39 N. H. 304). So may a statute which modifies the common law rule excluding parol evidence to vary the terms of a written contract; and a statute making the protest of a promissory note evidence of the facts therein stated. These and like cases will sufficiently illustrate the general rule, that the whole subject is under the control of the Legislature, which prescribes such rules for the trial and determination as well of existing as of future rights and controversies as in its judgments will most completely subserve the ends of justice."

Also on page 453, the same author continues:

"Statutes making defective records evidence of valid conveyances are of a similar nature; and these usually, perhaps always, have reference to records before made, and provide for making them competent evidence where before they were merely void. But they divest no title, and are not even retrospective in character. They merely establish what the Legislature regards as a reasonable and just rule for the presentation by the parties of their rights before the courts in the future."

The Supreme Court of Illinois in the case of *C., B. & Q. R. Co. vs. Jones,* 149 Ill. 361 (24 L. R. A. 141) recognized this doctrine, it says:

"No man or corporation has a vested right in the rules of evidence. They pertain to the remedies provided by the state for its citizens and do not constitute a part of any contract. They are subject to the control and modification by the Legislature, whether affecting proof of existing rights, or rights subsequently acquired. Changes in them may be made applicable to existing causes of action."

This rule will also apply to actions then pending when the new law takes effect.

In the case of *Fish vs. Chicago, St. P. & K. C. Ry.*, 82 Minn. 9 (84 N. W. Rep. 458), a legislative act declaring the effect, as evidence, of records, plats and surveys made by the engineering department of municipalities of a state, was discussed and construed, and

it was held that the act was valid and applied to actions pending at the time it was enacted. The court says in part:

"The statute in question is a remedial one, which neither creates new rights, nor takes away vested ones, for it simply declares a rule of evidence. The right to have one's controversy determined by existing rules of procedure and evidence is not a vested right."

Also in the case of *Woodvine vs. Dean*, 194 Mass. 40 (79 N. E. Rep. 882), the same question arose; a statute was under discussion that provided that, on appeal from the land court to the superior court, a report of the judge of the land court should be *prima facie* evidence of the matters therein contained, and the court held, that, this statute applied to cases begun before the statute went into effect. Quoting from the opinion:

"It was not a statute changing the substantial rights of the parties but simply the rules of evidence. It relates of course to future and not to past trials, and only to the procedure as to evidence. The language is broad enough to cover every future trial and seems to be applicable to every such trial. * * * The statute being general in form, dealing only with a rule of evidence, and having reference only to civil cases, must be regarded as applicable to any future trial, whether or not in a case pending at the time it took effect."

The Supreme Court of Kansas, in the case of *Wheeler vs. Myers*, 64 Kan. 47, has passed on this

question. The facts in that case, briefly, were these: A suit was brought by an assignee of a real estate mortgage in which the assignment had not been recorded. This case was tried in 1898, while Chap. 160, Laws of 1897, was in force, requiring all assignments of real estate mortgages to be recorded, and providing that if they were not recorded within a certain time, they should not be received in evidence in any of the courts of Kansas against the mortgagor, his heirs or assigns. At the first trial of the case, the lower court rendered a judgment foreclosing the mortgage, and the case was appealed to the supreme court and reversed because the court erred in receiving the assignment in evidence. A mandate was issued directing the lower court to grant a new trial in accordance with the opinion. While the case was pending in the supreme court, the law of 1897 was repealed by Chap. 168, Laws of 1899. Upon a retrial of the case the defendant claimed that the repeal of the law of 1897 would not affect his rights to rely upon the fact that the assignment was not recorded, to defeat the plaintiff's foreclosure. This theory was adopted by the lower court, and judgment was rendered for the defendant, refusing to foreclose the mortgage. The case was again appealed to the supreme court, and in reversing the judgment the court says:

"It is contended by counsel for plaintiff in error, that the case we are now considering should have been

tried in the court below and the rights of the parties determined under the provisions of Chap. 168, Laws of 1899, above referred to and that Chap. 160 of the laws of 1897, having been repealed after the first trial, its provisions could have no application in the last trial of the cause, the record of which is now before us.

We think that this contention of counsel is sound. The change in the law resulted in a change of the rules of evidence merely. Under the law of 1897, the failure to record the assignment of the mortgage excluded it from the consideration of the court, as evidence in the cause against the mortgagor. A party can have no vested right in mere rules of evidence, and such rules affecting, as they do, only the remedy the legislature may modify them."

See also:

Hubbard vs. N. Y., etc., R. Co., 70 Conn. 563 (40 Atl. 533);
Campbell vs. Holt, 115 U. S. 620.

The authorities cited by plaintiff in error do not sustain the doctrine he contends for. In all of the cases on which he relies, the subsequent act of the Legislature changed the law existing when the contract was entered into, or changed the remedy to such an extent that no remedy was left by which the contract could be enforced. Thus in the case of *Pennoyer vs. McConnaughy*, 140 U. S. 1, upon which plaintiff in error seems largely to rely, the statute of 1870 authorized a sale of certain swamp lands in Oregon, which

gave the applicant ninety days after publication of the notice of filing the map of the surveys in which to pay 20 per centum of the purchase; the purchaser made his application, and a contract was entered into between him and the state, and before the map was filed, and before he had any opportunity to make the payment, the law was changed so that all who had failed to make payment at the time the new law went into force, would forfeit their rights under such contracts; it was rightly held that such legislation impaired the obligation of the contract. There is a wide difference between that case and the one at bar, because in the Reitler case, the law of 1907 does not attempt to change the contract in any way, but as we have heretofore pointed out, only changes the rule of evidence, making certain facts *prima facie* evidence of a forfeiture. It does not prevent plaintiff in error from showing that his right had not in fact been barred by the forfeiture, or from showing that he was not in fact in default in the payment of interest.

Counsel for plaintiff in error cites *States ex rel Brown et al. vs. McPeak*, 47 N. W. 691, as an authority sustaining his contention. In that case, as stated by counsel, the Nebraska Legislature attempted to deprive the lessee of certain school lands of the right to select one of the appraisers which privilege was given him by the terms of the statute under which his lease was made. The court holds that this could not be done

since it would impair the obligation of the contract entered into between him and the state. Quoting in part the language of the court it says:

"This is a right arising under the contract which may be indispensable to protect his interest. It is not a law affecting the remedy, or mode of enforcing the contract, which is clearly within the control of the Legislature. * * * The well known rule is that the remedy may be modified in such way as the Legislature may deem just and reasonable."

This case is in no way in opposition to the doctrine contended for by the defendant in error, in fact it is in harmony with us as it recognizes the right of the Legislature to change the remedy, or the rules of evidence.

We submit that the law of 1907, complained of by plaintiff in error, does not impair the obligation of the Reitler contract. Reitler has the same rights under his contract that he had before the law was passed, except that it casts on him the burden of proving that no default had legally been taken against his right to the land. As we have shown, the authorities are unanimous in sustaining the doctrine that the Legislature may change the rules of evidence, even during the pendency of a suit, so as to cast the burden of proof on either party. If the Act of 1907 should have undertaken to say that the fact of the annotation of the clerk must be taken as conclusive evidence of the for-

feiture, then it would have been void as a legislative determination of the facts, and an invasion of the province of the court, and a taking of property without due process of law. This act does nothing of the kind. On the contrary, it leaves him the right to be heard and to produce his evidence.

Respectfully submitted,

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IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES REITLER,
Plaintiff in Error,
vs.
WM. A. HARRIS,
Defendant in Error.
No. 99.

REPLY BRIEF.

The brief of defendant in error is predicated entirely on the theory that the statute of 1907 complained of, merely changes a rule of evidence and is therefore valid. I concede without qualification that the legislature may change a rule of evidence or establish for the future what shall be prima facie evidence of a fact in any

future trial even though it may involve a case then pending but not tried. Counsel for defendant in error however err in attempting to apply this principle to the case at bar. They assume, apparently, that the act of 1907 applied only to the trial before the district court of Edwards county in April, 1907. This is a mistake. The district court did not forfeit Reitler's certificate of purchase and could not do so. It was simply deciding whether or not Reitler's certificate had been legally forfeited by the county clerk of Edwards county in September, 1901. The district court had no power to forfeit Reitler's certificate. That power by the statute of 1879 rested solely in the county clerk and the inquiry of the district court, of the Supreme court of the state of Kansas and of this court is addressed solely to the question as to whether the county clerk pronounced a valid forfeiture. Conceding as I do that the legislature might change a rule of evidence established or provide what might be prima facie evidence of a certain fact for the future, I deny explicitly that the legislature may change the evidence upon which the county clerk might alone pronounce a valid forfeiture so as to make an invalid forfeiture valid. Under the statute of 1879 the county clerk could only act upon the return of the sheriff. The validity of his act depended, not upon what the sheriff actually did, but upon what the sheriff said that he did. This is laid down very clearly in the case of Spencer vs. Smith, 74 Kansas 152,

where it is said in the opinion; "The basis of a forfeiture is the notice and the return of service. It rests upon written evidence of official action and is not left to the uncertain recollection of officers who may be asked eight years afterward what steps toward a forfeiture were taken. As was said in Knott vs. Tade, 58 Kansas 94, Jurisdiction must appear and the notice and the return are jurisdictional."

The jurisdiction of the county clerk to pronounce a forfeiture of Reitler's certificate in 1901 depended upon the notice and the sheriff's return thereon. The county clerk had no right or authority to take oral evidence as to what the sheriff actually did or base a forfeiture upon what the sheriff actually did. The jurisdiction of the county clerk depends solely upon the written return of the sheriff which became a part of the records affecting said tract of school land, to which all parties dealing with such tract were bound to refer and upon which all rights in such tract were based. The district court of Edwards county when it tried the case in 1907 had no jurisdiction to forfeit Reitler's certificate. Its only power was to try and determine whether the county clerk in 1901 had jurisdiction under the law as it then was, to forfeit the certificate. Upon that point there is no question, no dispute. The sheriff's return was utterly invalid and conferred no jurisdiction upon the county clerk to forfeit the entry. That being admitted the question in this case is whether the legislature in

1907 might retroactively confer a jurisdiction upon the county clerk in 1901 and thereby breathe the breath of life into this dead forfeiture.

I have examined with care every decision cited by counsel for the defendant in error; not one of them is retroactive. Every act changing a rule of evidence held valid by these decisions applies to the future. The county clerk could not by entering upon his record the words, "Cancelled", "Forfeited" or the like, confer upon himself jurisdiction to pronounce a forfeiture of Reitler's certificate any more than a court, even though of general jurisdiction, may confer upon itself jurisdiction of a defendant by merely recording such fact upon its records. True, in the absence of any evidence upon the subject of jurisdiction the records being lost, upon collateral attack, the jurisdiction of such court would be presumed. But if the record when produced shows that the court never had jurisdiction of the defendant, under the law of service as it then existed, the jurisdiction fails.

Here is a stronger case. The Supreme court of the state of Kansas has held repeatedly in the cases cited in my original brief, that no intendment or presumption aids the jurisdiction of the county clerk to pronounce a forfeiture. It must affirmatively appear from the return of the sheriff and not otherwise and the crux of this case is whether the county clerk in 1901, had power to pronounce this forfeiture. If the for-

feiture was invalid then the decision of the district court of Edwards county depriving Reitler of this land, is taking his property without due process of law and the statute of 1907 attempting to aid such proceeding, violates the obligation of a contract. Some parts of the act of 1907 are clearly valid and not only valid but wise.

The preamble, page 11 of my original brief, recites the purpose of the act. It declares that in many cases full and correct returns were not made of the forfeitures of school lands. That in many cases the notice and the sheriff's return of service have been lost or destroyed, therefore it is enacted.

It is quite clear from this preamble that the intention of the legislature was to establish for the future in trials concerning school land simply a prima facie evidence of the validity of such forfeiture, in the absence of the sheriff's return.

Section 1 of the act provides that entries made by the clerk indicating a forfeiture shall be prima facie evidence of such forfeiture. This section is clearly valid in the absence of the sheriff's return. Under this section the jurisdiction of the county clerk to pronounce the forfeiture would be presumed by reason of the entry on the records. How would such prima facie evidence be rebutted? By the production of the notice itself and the sheriff's return thereon. That is what we did in this case. We produced the sheriff's return and it is a part of the record.

Section 2 of the act attempts to dispense with

personal service of the notice and make the mere posting of a notice in the county clerk's office sufficient to give the county clerk jurisdiction to pronounce the forfeiture. This, I contend, is invalid. Even in a court of general jurisdiction where all the presumptions support the right and authority of the court, the legislature could not, six years later, change the law of service so as to validate a judgment, pronounced upon a service, void under the statute as it existed at the date of service. This is too clear to need argument and exactly this is what section 2 attempts to do. The law as it existed at the time of the service required personal service upon the holder of a certificate. If that could not be had then personal service upon all persons in possession of the land and if no one was in possession of the land, then service by posting the notice in the county clerk's office.

Service was made upon C. C. Potter only. The return did not show that service could not be made in the county upon Reitler and did not show that Potter was the only person in possession of the land and did not show that notice had been posted in a conspicuous place in the county clerk's office. Under the law in force at the time of the service it was void for all of these reasons. The forfeiture was invalid. Then the act of 1907 attempts retroactively to validate this service by making a mere posting of the notice, service sufficient to give the county clerk jurisdiction to pronounce the forfeiture. The

legislature might as well attempt to validate any void service in a district court of Kansas by amending the statute so as to comply with the return made and thus retro-actively give the court a jurisdiction that it did not have when it pronounced the judgment.

Section 3 of the act of 1907 attempted to perform more extensively the same office as section 2, attempts to change the law of service and make an invalid and void service effective in favor of a subsequent purchaser. As pointed out in Spencer vs. Smith supra there can be no such thing as an innocent purchaser of school land where the attempted forfeiture of previous rights is void. The subsequent purchaser is presumed to know the law, to examine the records, to take notice of the invalidity of the sheriff's return and the forfeiture under it and section 3 attempts to retroactively invest the subsequent purchaser with the qualities of innocence and good faith, excuse him from knowledge of the law and the duty of examining the records. No statute can do this.

Section 4 which establishes a limitation upon actions in the future is clearly valid. All of these sections more or less attempt to make the entries of the county clerk, however erroneous, however mistaken, conclusive evidence and this, counsel for the defendant in error, concede that the legislature may not do. It seems to me in the light of this discussion that the entire brief of the defendant

in error is without force, is addressed to a controversy that does not here exist. I agree with them as to all that they have said with regard to the power of the legislature to change the rules for the future but they have failed to cite a single case and I have failed to find in the books a single case where any legislature was permitted the power of retroactively conferring jurisdiction upon any court or tribunal so as to validate a judgment, void because of defects in its service, under the statute as it existed at the date of judgment. This is the whole point in this case. The confusion of counsel for the defendant in error arises from a disregard of the real point at issue. That is the power and jurisdiction of the county clerk to pronounce this forfeiture in 1901. Neither this court nor the Supreme court of Kansas nor the district court of Edwards county has or ever had any power to forfeit Reitler's certificate. All that we are doing in this case; all that was done in the supreme court of Kansas and in the district court of Edwards county, was to examine this forfeiture and determine its validity upon the service that was before the county clerk when the forfeiture was attempted. At that time the county clerk had no right to take oral evidence as to what the sheriff did. So held in Spencer vs. Smith.

There is no proof that he did take such evidence but if he did he exceeded his authority upon the written return of the sheriff. Upon

that return alone the validity of the forfeiture is based. I might go further and admit every thing that counsel for the defendant in error have claimed and still Reitler's certificate is unimpaired. As pointed out in my original brief, among the things which must appear somewhere either upon the sheriff's return or in the oral evidence taken in a subsequent trial, it must be found, it must appear that if personal service could not be had upon Reitler in the county; then, before the posting of the notice in the county clerk's office shall accomplish anything it must appear that the notice was served upon ALL PERSONS IN POSSESSION OF THE LAND. The findings of the district court of Edwards county show that the notice was only served upon C. C. Potter in possession of the land. The sheriff's return did not show that he was the only person in possession of the land. No evidence was offered that he was. The lower court does not find that he was and to establish the validity of this forfeiture, even under the law of 1907 which provides for oral evidence, such oral evidence must fully and completely supply the omission of the sheriff's return and completely and fully show all the jurisdictional facts, among which are, that the notice must have been served upon all persons in possession. Upon this point see, True vs. Brandt, 72 Kansas 502, and particularly, Phares vs. Gleason, 73 Kansas 604.

In conclusion I submit that the inquiry of this court as well as of the lower courts is simply

and solely whether the county clerk had jurisdiction to pronounce the forfeiture of 1901; since that jurisdiction depends entirely upon the sheriff's return and that return showed that the county clerk had no jurisdiction, that forfeiture was invalid. The district court of Edwards county had no power to take testimony to validate this forfeiture. The district court had no power retroactively to confer jurisdiction upon the county clerk six years earlier and thereby validate a void service. The act of 1907 so far as it is valid simply provides for prima facie evidence of a valid forfeiture in the absence of the sheriff's return. Where the sheriff's return is produced and shows no service under the statute the county clerk had no jurisdiction. The forfeiture is invalid and no act of the legislature can confer jurisdiction upon the county clerk in the past. If the forfeiture as against Reitler was void, the act of 1907 is void because it impairs the obligation of a contract and the act of the district court of Edwards county is void because it takes Reitler's property without due process of law. The whole inquiry must be restricted to the validity of the forfeiture of 1901. The act of 1907 is valid only in so far as it establishes a rule of evidence in future trials. It cannot validate a void forfeiture any more than it could confer jurisdiction upon a court to pronounce a judgment by amending the statute of service so as to conform to the service had in

the case, if the service was void under the statute then in force.

If the inquiry is so confined, as I contend it should be, there can be no question that the forfeiture of Reitler's certificate was void, that the act of 1907 so far as it is attempted to be applied retroactively is void. The decision of the district court of Edwards county was erroneous; the decision of the supreme court of Kansas was erroneous and should be reversed by this court.

The preamble of the Act of 1907 together with its different provisions, clearly disclose that the purpose of the Legislature was to invalidate the old certificates of purchase and validate the new; to help the new entry men as against the former holders; to legislate for one class as against the other.

It is the kind of legislation to which State Assemblies are prone in times of popular excitement. It is the kind of legislation that the fathers foresaw and guarded against by the first paragraph of Section Ten and the Fifth Amendment to the Constitution.

It clearly violates the obligation of the contract into which the State entered with Reitler, and the attempt to confer ex post facto jurisdiction on the county clerk and thus validate the invalid forfeiture of his certificate, deprives him of his property without due process of law.

All of which is respectfully submitted.

F. DUMONT SMITH,
Attorney for Plaintiff in Error.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

CHARLES REITLER,
Plaintiff in Error,

vs.

WM. A. HARRIS,
Defendant in Error.

No. 99.

STATEMENT.

This is a suit in ejectment, brought by the plaintiff in error, hereafter referred to as plaintiff; against the defendant in error, hereafter referred to as defendant, in the District Court of Edwards County, Kansas, to recover possession of the Northwest Quarter (¼) of Section Thirty-six (36),

Township Twenty-six (26), Range Eighteen (18) in Edwards county, Kansas.

Suit filed on January 19, 1907. Defendant answered under the Kansas Statute by general denial. Case was tried to the court at regular April term thereof 1907. Case taken under advisement. Thereafter, on May 16, 1907, the said District Court at an adjourned day of the regular April, 1907, term of said court, made and entered judgment in favor of the defendant (page..6..... of the record) and at the same time made and entered certain findings of fact which are as follows, to-wit:

"FIRST: That on September 2, 1886, David Thompson duly made final proof on the land in controversy, to-wit: The Northwest quarter of section 36, township 26, range 18, in Edwards county, Kansas, and was duly declared the purchaser thereof, at the appraised price of $3 an acre, and the said Thompson duly made his first payment thereon on September 2, 1886, of $48 and duly received the school land certificate therefor.

SECOND: On March 3, 1888, the said David Thompson, a single man, duly assigned said school land certificate and all his rights thereunder to John W. Berry; that on March 21st, 1888, John W. Berry and..... Berry, his wife, duly assigned said school land certificate and all their rights thereunder to Charles Reitler, the plaintiff in this case for the sum of $1200.00.

THIRD. That thereafter the said Charles Reitler made due payments of interest and taxes on said land un-

til November 22, 1898, but made no payments thereafter until September 22, 1906, at which time the said Charles Reitler made payment of principal and interest then due in the sum of $432.00 and then paid taxes and interest thereon in the sum of $207.36, the same being the payment of taxes and interest required to pay out on said land at that date in full and then and there received a final receipt therefor.

FIFTH: That on the 26th day of September, 1906, the said Charles Reitler having presented his school land certificate as aforesaid on said land, showing full payment of principal and interest thereon and the taxes thereon to said date, the Governor of said state did, on the 26th day of September, 1906, issue to the said plaintiff, Charles Reitler, a patent for said land of said date, duly attested by the Secretary of State, of the State of Kansas, under the hand and seal of the said Governor and the Secretary of State, which said patent was duly recorded by Seth G. Wells, register of the state land office, in volume 27, at page 35, and thereafter duly recorded by the register of deeds in Edwards County, Kansas, on the 6th day of December, 1906, in book of deeds at page 163, and entered in the transfer record of said county by the County Clerk thereof on the 14th day of December, A. D. 1906.

SIXTH: That on January 19th, 1907, plaintiff commenced his action in ejectment against the defendant, William A. Harris, alleging that he was the owner and en-

titled to the immediate possession of the northwest quarter of section 36, Township 26, range 18 in Edwards County, Kansas, a formal petition in ejectment. That on February 20th, 1907, the defendant filed his answer by his attorneys, L. M. Day and A. C. Dyer in said action, in which he denied each, every, all and singular, the allegations and averments in said petition contained, and that the said cause was tried upon the said petition and answer.

SEVENTH: That the said plaintiff having failed to make the payment of interest and taxes after November 22, 1898, as aforesaid, the clerk of Edwards County, did, on July 13th, 1901, duly issue a notice as and to the said Charles Reitler as a defaulting purchaser of said school land, which said notice set forth that the said Charles Reitler as the assignee of the original purchaser of the Northwest quarter of section 36, township 26, range 18, Edwards County, Kansas, being state school land purchased from the state of Kansas, was then in default in the sum of $51.84 as annual interest; that therefore if the said Charles Reitler failed to pay or cause to be paid the amount due as aforesaid, together with the costs of issuing and serving this notice within 60 days from the date of the service thereof, that the rights of the said Charles Reitler would be forfeited, which said notice was duly given under the hand and official seal of Albert Aderhold, the then County Clerk of Edwards County, Kansas, on July 13, 1901.

EIGHTH: The said notice duly came into the hands

of F. S. Avery, the then duly elected and acting sheriff of Edwards County, Kansas. That at said time the said Charles Reitler to the knowledge of said Avery, sheriff, was a non resident of, and absent from the state of Kansas, and had so been a non-resident of the state of Kansas for more than 10 years prior to that time. That the said sheriff made the following return upon said notice, to-wit: "Received this notice this 13th day of July, 1901, and served the same by leaving a copy with C. C. Potter, who occupied the within premises July 17, 1907. F. C. Avery, Sheriff. Costs, Sheriff's costs, $4.60; County Clerk's costs $ .25; total, $4.85." That on July 17, 1901, a copy of said notice was duly posted in the office of the County Clerk of Edwards County, Kansas. That after the expiration of 60 days from the attempted service of said notice as aforesaid, the County Clerk of said County entered upon his school land record of said County the following notation: "Land forfeited."

NINTH: That from about the year 1893 until the time that Silas Potter settled upon said land, the said land was vacant as to improvements, not cultivated or tilled and had no improvements thereon, except such as were accidentally placed thereon by C. C. Potter. That the said Charles Reitler committed no physical act of abandonment, as to said land, that the said land was in the same condition as to improvements and occupancy from about the year 1893 until the said Silas Potter settled thereon, except as to the house placed thereon as shown in finding

No. 11, and that Charles Reitler never resided thereon.

TENTH: That the only act of abandonment committed by the said plaintiff was his failure to pay the installments of interest and taxes on said land as herein recited.

ELEVENTH: That sometime prior to the year 1901, C. C. Potter, a brother of Silas Potter, had moved a house onto said land, supposing it was on the Northeast quarter of the same section; that later it was discovered that the said house was on the Northwest quarter. That in the fall of 1901, and after the attempted forfeiture of said land, one Silas Potter learned from the County Clerk of the facts about the forfeiture as aforesaid, and having bought the said house of C. C. Potter and relying on the said attempted forfeiture filed on the said land, moving into the said house, and continued to occupy the same until he sold the same to the defendant. The said Silas Potter built a barn on said premises, dug two wells, broke out 18 acres and built some fence on it, and thereafter made final proof on his settlement before the probate judge of Edwards County, Kansas, and received a school land certificate of purchase therefor and duly made payment of interest and taxes up to the time of the commencement of this suit. Said certificate of purchase was dated on or about the 29th day of March, 1902.

TWELFTH: That the said Silas Potter bought the said land at the appraised price of $200 for the quarter section.

THIRTEENTH: That in the spring of 1904, said Silas

Potter sold his right, title and interest in the land and the improvements thereon to the defendant, William A. Harris, for the sum of $1320, paid to the said Potter by the said Harris, and duly assigned the certificate of purchase as aforesaid to the said Harris. That at that time the improvements consisted of a house, two wells, barn, a milk house, one windmill, 80 acres fenced and the breaking.

FOURTEENTH: That the defendant Harris purchased the rights of the said Silas Potter on the faith of the attempted forfeiture hereinbefore recited, and that the said Harris has ever since held possession of the said land and occupied the same as his home and now occupies it.

FIFTEENTH: That at the time the said Charles Reitler ceased to pay interest on his school land certificates and the taxes on the land in the year 1898, said land had very little market value and was not worth to exceed $150. And at the time the said Silas Potter settled on said land and purchased the same from the state of Kansas, it was worth about the sum of $200. That at the time the said Charles Reitler paid the balance of the principal and interest due on his certificate of purchase on the 22nd day of September, 1906, said land was reasonably worth the sum of $1600 and the value of the improvements made by the defendant, Harris, and Silas Potter on said land was $600.

SIXTEENTH: That at the time the said plaintiff quit paying interest on said school land in 1898 and at the time the same was purchased by Silas Potter as a settler,

said Charles Reitler had a local agent residing in Edwards County, Kansas, one H. C. Bingham. That said Reitler knew the value of said lands during all of said years, and either had knowledge and information that said school land certificate of purchase had been forfeited and that the said Silas Potter had settled upon and improved said land as a settler thereon and knew that Potter was making valuable and lasting improvements on said land, or might by the exercise of ordinary care have acquired all of such knowledge. That said Reitler did not in any way object to such settlement and improvement of said land and did nothing to prevent the same and did not in any way object to or protest against the forfeiture of said school land certificate.

SEVENTEENTH: That when said Silas Potter entered upon said land as a settler in September, 1901, said land was unimproved and he lived thereon and made improvements thereon until the 2nd day of February, 1904, and during all of this occupancy of said land no one objected to his settlement, improvement or purchase of said land.

EIGHTEENTH: The said defendant, William A. Harris, on or about the 2nd day of February, 1904, purchased said land from said Silas Potter, paying him therefor the sum of $1320 in cash and assuming the balance of the principal and interest due the state of Kansas, being $180, the principal. That the value of the improvements would figure out $620.00 and the value of Potter's interest in the land $700.00. That at the time of defendant's said purchase said Potter relied upon the legality of the pur-

chase of said land by said Silas Potter. That since his purchase of said land said defendant has added lasting improvements valued at $.....

Eighteen findings of fact—pages....6.....to .....10..... of the record.

And upon said findings of fact made and entered certain conclusions of law as follows, to-wit:

"I conclude that the notations on the record of the County Clerk prove prima facie a due and regular forfeiture of the certificate under which plaintiff held, which proof has not been overcome.

"I conclude that the abandonment of the land by Reitler, his acquescence in the forfeiture; in the possession of the subsequent purchaser for the period necessary to give him a settler's right to purchase, his failure to protest against the subsequent sale, were sufficient to lead the subsequent purchaser to believe he was accepting such forfeiture as sufficient and binding, and that he is now estopped from complaining of irregularities in the forfeiture proceedings against a purchaser in good faith on the strength of such proceedings and especially against a person who, like the defendant, has paid a large sum for the assignment of the certificate and for which he could have no relief were he dispossessed of the land." (Pages....9.....to .....10.....of the record.)

Thereafter said case was duly appealed to the Supreme Court of the State of Kansas, the same being the highest court of said state and on the 8th day of April, 1909, the

same being one of the regular judicial days of the January, 1909, term of the Supreme Court of the state of Kansas, the court having duly considered said cause, affirmed the judgment of the lower court. (Page. 11. of the record.)

The opinion of the court in said case is found in the case of *Reitler vs. Harris* 80 Kans. 148. Thereafter, on May 19, 1909, the plaintiff in error, duly filed his petition for re-hearing. (Pages....16..... to ..20..... of the record.) And on June 12, 1909, said petition for re-hearing was by the Supreme Court of the State of Kansas denied. Plaintiff prosecutes error from the said final decision of the Supreme Court of the state of Kansas. The facts sufficiently appear from the findings of the District Court of Edwards County, Kansas.

The act under which it was attempted to forfeit Reitler's entry, *Section 2, Chapter* 161 *Laws of* 1879 or so much as is applicable, reads as follows:

"If any purchaser of school land shall fail to pay the annual interest when the same becomes due, or the balance of the purchase-money when the same becomes due, it shall be the duty of the county clerk of the county in which such land is situated immediately to issue to the purchaser a notice in writing, notifying such purchaser of such default; and that if such purchaser fail to pay or cause to be paid the amount so due, together with the costs of issuing and serving such notice, within sixty days from the service thereof, the said purchaser, and all persons claiming under him, will forfeit absolutely all right and interest in and to such land under said purchase, and an action will be brought to eject such purchaser, and all persons claiming under him, from such land. It shall be the duty of said county clerk to include in such notice all tracts of land sold to

the same purchaser, and on which default in any such payments then exists. The notice above provided for shall be served by the sheriff of the county by delivering a copy thereof to such purchaser, if found in the county, also to all persons in possession of such land; and if such purchaser cannot be found, and no person is in possession of said land, then by posting the same up in a conspicuous place in the office of the county clerk. And in case such land or any part thereof has been sold for taxes, a copy of such notice shall be delivered to such purchaser at tax sale, if a resident of the county. Said sheriff shall serve such notice and make due return of the time and manner of such service, within fifteen days from the time of his receipt of the same. The sheriff shall be entitled to the same fees and mileage for serving the same as allowed by law for serving summons in civil actions. If such purchaser shall fail to pay the sum so due, and all costs incident to the issue and service of said notice, within sixty days from the time of the service or posting of such notice as above provided, such purchaser, and all persons claiming under him, shall forfeit, absolutely, all rights and interest in and to such land under and by virtue of such purchase."

By Chapter 373 of the Laws of 1907 the Legislature undertook to validate certain void forfeitures. This act is as follows:

WHEREAS, Certain school-lands situated in various counties of this state were sold to purchasers whose interest in the land purchased was subsequently declared forfeited, on the ground of default in the payment of money due the state, and thereafter such lands were sold to new purchasers, to whom certificates of purchase were issued; and

WHEREAS, In many cases full and correct records and returns have not been made by the county clerk and sheriff of the proceedings upon which such declared forfeitures were based, and in some cases the notices issued by the

county clerk to purchasers of their defaults and the sheriff's returns of service thereof have been lost or destroyed, to the prejudice of the rights of such new purchasers; therefore,

Be It Enacted by the Legislature of the State of Kansas:

SECTION 1. Where entries which appear upon the records of school-land sales, or of school-land-sale certificates, in the office of the county clerk of any county in this state, and purporting or shown to have been made in the usual course of the business of that office, indicate that the interest of the purchaser in the tract of land, in connection with which such entries were made had been forfeited for default in the payment of money due the state on such purchase, and such land was thereafter sold to a new purchaser, such entries shall be prima facie evidence, in any action or proceeding in any court in this state, that proper notice of the purchaser's default had been issued and legal service thereof made, and that all things necessary to be done as conditions precedent to the forfeiture of the right and interest of the purchaser, and all persons claiming under him, in and to such land, had been duly and properly done and performed, and that such forfeiture had been duly declared. Any entry upon said records of the county clerk as "canceled," "forfeited," "reverted to state," "state," and the like, with or without date, shall be held to be an entry indicating that the interest of the purchaser had been forfeited.

SECTION 2. The return of the sheriff on any notice issued by the county clerk to the purchaser of school-lands of his default shall not be held to show an insufficient or invalid service because of the omission of any recitals required by law to show legal service; but if, notwithstanding such omissions, such return shows that service of such notice was made by posting a copy thereof in the office of the county clerk, such return shall be prima facie evidence, in any action or proceeding in any court in this state, that the persons upon whom such notice was to be

served, could not be found in the county, that no person was in possession of the land described in the notice and that a copy of such notice was posted in a conspicuous place in the office of the county clerk. Any statement in such return, other than that the notice was posted in the office of the county clerk, shall not destroy the prima facie effect as evidence of so much of the return as shows a posting of the notice in the office of the county clerk, unless such additional matter affirmatively shows that legal service was not made; and in that case, or in any case where the sheriff's return fails to show legal service, parol and other evidence may be introduced to prove that in fact legal service of the notice was made.

SECTION 3. Where any purchaser of school-land defaulted in payments due the state and abandoned the land purchased, and thereafter a notice, issued by the county clerk to such purchaser of his default, was served by posting a copy thereof in the office of the county clerk of the county in which such land was situated, and the right and interest of the purchaser in and to such land was declared forfeited, and the land was subsequently sold to a new purchaser, by whom, or by whose assigns, it was taken possession of and improved, such notice shall be held to be a sufficient notice to the first purchaser of his default upon which to base such forfeiture, and no other notice need be shown.

SECTION 4. No action shall be brought by any purchaser of school-land, or by the assignee of such purchaser, in any court of this state, to recover any tract of school-land, or to enforce the purchaser's right to or interest in the same, when a forfeiture thereof has been declared, unless such action be commenced within six months after such forfeiture was declared, or, when such time has already elapsed, within six months after this act takes effect.

SECTION 5. For the purpose of giving full force and effect to the provisions of each section of this act, it shall

be held that either of the preceding sections have been enacted had the other of such sections not been included herein; it being the intention of this act, as far as legally may be, to protect all purchasers and settlers of school-lands from the claims of prior purchasers whose interests have been declared forfeited and the lands again sold to other persons, and to that end the provisions of this act shall be liberally construed.

SECTION 6. This act shall take effect and be in force from and after its publication in the official state paper.

Approved January 24, 1907.

Published in official state paper January 25, 1907."

This act took effect January 25, 1907.

The question in this case is whether the act of 1907 as applied by the lower court and the Supreme Court of the State of Kansas, is valid, or whether it contravenes *Article* 1 *Section* 10 of the Federal Constitution by impairing the obligation of a contract. The court held the act valid and decided the case solely upon that proposition, thus presenting to this court the question stripped of all other propositions of law or fact.

SPECIFICATION OF ERRORS.

First. The Supreme Court of the state of Kansas erred in affirming the judgment of the lower court in favor of defendant.

Second. The Supreme Court of the state of Kansas erred in overruling plaintiff's petition for re-hearing.

Third. The Supreme Court of the state of Kansas erred in holding the act of 1907 valid.

Fourth. The District Court of Edwards county erred in holding the act of 1907 valid and in rendering judgment in favor of the defendant and against the plaintiff.

BRIEF AND ARGUMENT.

The land in controversy was settled upon in September, 1886, by one David Thompson, who duly made his first payment of Forty-eight (48) Dollars and received a school-land certificate therefor. This certificate by subsequent assignment became the property of the appellant, Charles Reitler, who made due payments of interest and taxes until November, 1898. Thereafter and on September 22, 1906, Reitler made payment of all the principal and interest then due, the sum of Four Hundred Thirty-two (432) Dollars and also paid the taxes and interest amounting to Two Hundred Seven (207) Dollars and Thirty-six (36) cents. Thereafter and on September 26, 1906, the governor of the state of Kansas duly issued the said Reitler a patent to said land. On January 19, 1907, and before the passage of the act of 1907, Reitler commenced his action in ejectment. Under the Kansas practice the Federal question would not be raised by the pleadings as the plaintiff merely pleads his ownership and right to possession and the defendant, under a general denial, may make any defense he may have. In July, 1901, Reitler, being then in default, the county clerk of Edwards county issued a notice to Reitler under the act of 1879, which said notice came into

the hands of the sheriff of said county. The sheriff returned said notice as follows: "Received this notice this 13th day of July, 1901, and served the same by leaving a copy with C. C. Potter, who occupied the within premises, July 17, 1907. F. S. Avery, sheriff." Eighth finding, page.....7.....of the record.

Copy of said notice was "posted in the office of the county clerk" and at the expiration of sixty days from the attempted service of said notice the county clerk entered on his school land record the notation, "land forfeited."

THE FORFEITURE VOID.

This forfeiture was void for the reason that the sheriff's return failed to show, first, that Reitler was not in Edwards county, Kansas. Second, it failed to show that the sheriff served the notice on all the persons in possession of said land. Third, that the notice was not posted in a "conspicuous place."

The Supreme Court of Kansas has had occasion to consider this section and forfeitures thereunder many times. In *Knott vs. Tade* 58 Kans. 94 it was held that a forfeiture was void because the sheriff's return did not show that the notice was posted "in a conspicuous place in the office of the county clerk." The court says further. "The notice and the return of service in such cases are jurdisdictional. No intendment of material matter will be made and no presumption of a material character will be indulged in such cases for the purpose of subjecting parties to jurisdic-

tion. Jurisdiction must affirmatively appear, and, usually, with technical fullness." Again, "Forfeitures are not favored in the law; rather are they to be discountenanced, and to be relieved against whenever practicable. The proceedings in forfeiture are strictly construed against the right to its exercise."

In *Hansen vs. Wilson* 40 Kans. 211 it was held that a forfeiture was void based upon a notice received by the sheriff on April 23, 1887, but which was not returned until May 13, 1887, more than the legal 15 days, and the court in that case held that the notice must be served and returned strictly in accordance with the statute or there could be no valid forfeiture. This decision in 1888, interpreting this statute, remained the law until the act of 1907 was passed.

In *Furniture Company vs. Spencer* 59 Kans. 168 forfeiture was held void because the return of the sheriff showed only that the purchaser was "not found." That such statement in the return is not equivalent to the requirement that the purchaser cannot be found. That to justify constructive service by posting the notice in the county clerk's office, the return of the sheriff should affirmatively show that no person was on the land at the time of the attempted service and that such notice must be posted in a conspicuous place.

In *True vs. Brandt* 72 Kans. 502, the sheriff returned that he "found no one in possession of the land." The court held that this was not a finding or return, that no

one was in possession, and that therefore the forfeiture was void.

In *Phares vs. Gleason* 73 Kans. 604, the sheriff's return showed that the notice was served upon one Martin J. Phares, who was in possession of said land but it did not show that the notice was served upon "all persons in possession of the land" and the court held the forfeiture void.

In *Spencer vs. Smith* 74 Kans. 142, it is said (page 145 of the opinion): "Whatever the general rule may be as to the loss of an equitable interest under a contract of purchase by abandonment, the policy of the state in respect to the disposition of school-land is against that theory. The statute, which expresses the state's policy, provides that a purchaser of school-land, who is in default may pay the delinquent interest and taxes, and this without limitation as to the time of default or the circumstance of possession. * * The right of redemption remains in the purchaser until his rights are forfeited as the statute provides." The forfeiture was held to be void because the sheriff's return did not show that no one was in possession of the land and did not show that the notices put up in the county clerk's office were posted in a "conspicuous place." The defendant offered to show, orally, that no one was in possession of the land and that the notices were posted in a conspicuous place. The court says: "The testimony is not admissable. The basis of a forfeiture is the notice and the return of service. It rests upon written evidence of official action, and is not left to the uncertain recollection of

officers who may be asked eight years afterward what steps toward a forfeiture were in fact taken. As was said in *Knott vs. Tade supra,* jurisdiction must affirmatively appear, and the notice and the return are jurisdictional. These are to be found in the county clerk's office and to them any interested party may look to determine the status of the land. An examination of the notices issued in this case, anl the return of service made thereon, would have disclosed to the purchaser as well as to the officers or a proposed purchaser that the proceedings were invalid. The jurisdiction cannot be supplied by oral proof or an attempt in this proceeding to amend the returns made in the forfeiture proceedings."

In *Hickert vs. Van Doran* 76 Kans. 674, it is said in the syllabus: "An attempted re-sale of school-lands to which the rights of a prior purchaser have not been legally forfeited is without authority of law and is void."

In that case the notice and sheriff's return were held to be invalid and the forfeiture void. Such was the law under the statute of 1879 and the uniform decisions of the Supreme Court of the state of Kansas in the seven cases just cited; when on September 26, 1906, Reitler, under his certificate of purchase, made final payment to the state and received a patent from the state for the land in controversy. It will be seen that the return of the sheriff in Reitler's case was void for several reasons.

FIRST. It did not show that Reitler could not be found in Edwards county.

SECOND. It did not show that C. C. Potter was the only person in possession of the land.

THIRD. It did not show that a copy of the notice was posted in the clerk's office in a conspicuous place or, in fact, posted at all.

So that under the law of the state of Kansas as it existed from 1879 to January, 1907, the attempted forfeiture was void and Reitler had a right to come in at any time and make his payment which he did, fully complying with the statute, whereby the contract became executed and a complete title to the land vested in Reitler. I have been particular to cite the statute and decisions of the state of Kansas, not because this court could, upon error, correct a mistaken interpretation by the Supreme Court of Kansas, of a Kansas law, but to show that the statute of Kansas and the uniform course of decisions for nearly twenty years of the highest court in Kansas had established and defined, in what manner and in what manner only, the rights of a school-land purchaser might be forfeited so as to validate the subsequent sale; that under the statute and these decisions Reitler's rights had never been forfeited and the patent was rightfully issued to him. After all this is done and after Reitler's title is complete and after he has commenced suit for possession the legislature of the state of Kansas, by the act of 1907, attempts to validate this void forfeiture, destroy the solemn contract made with Reitler which has ceased to be executory and become completely executed and seeks,

after Reitler has paid his money to the state on the faith and credit of the old statute and a long line of decisions to deprive him of his land without even offering to return to him the purchase price. I submit that the act of 1907, so far as it was attempted to be applied to this case by the district court of Edwards county and the Supreme Court of the state of Kansas, is void, in that it attempts to impair the obligation of a contract and contravenes Article One, Section Ten, of the Federal Constitution.

PER CONTRA.

Before considering the cases which I deem to be favorable to this contention, I desire to call attention to two cases, apparently unfavorable to the plaintiff, unless clearly analyzed. The first is the case of *Wilson vs. Standifer* 184 U. S. 399. In that case the Texas school-land law of 1879 provided for no forfeiture unless an implied one by judicial proceedings. By the act of 1897 forfeiture was provided for without judicial proceedings. It was contended that the later act violated the obligation of the contract. This court rejected that view but in this case Wilson's contract of purchase was wholly executory. He had been in default for several years; he waited for nearly two years after the passage of the act of 1897 before he tendered the amount due upon his contract and when he did tender it, it was rejected. It was further held by this court that his position, under the act of 1897, was fully as favorable as under the act of 1879 and that, therefore,

no substantial right of his had been violated. The court in that case, however, uses this significant language:

"It is also conceded that it was competent for the parties to have provided, as a substantive part of the contract, special remedies, each against the other, for the enforcement of their respective obligations, and that, in such a case, neither party could, without the consent of the other, resort to any form of remedy other than those stipulated for."

AGAIN:

"It is also true that a specific remedy provided by the contract itself cannot be changed by legislature because it constitutes a part of the contract."

AGAIN:

"The statute of 1879 does not give authority to any officer to rescind without judicial action but the right of recission existed in the state and its exercise might be subsequently authorized through the law-making power and an exercise of it based upon the default of the other party would not be denial of any right of his. It could only be held that the right of recission for the fault of the purchaser did not exist by holding that the contract provided that it should not exist or that it should be exercised in a particular manner."

This language from the Texas Supreme Court is cited approvingly by this court.

It will be observed that our contract is expressly excluded from the operation of the opinion in the case just cited. The parties, that is, the state and Reitler, provided "as a substantive part of the contract, special remedies, each against the other" and the court adds that in such case "neither party could, without the consent of the other, re-

sort to any form or remedy other than those stipulated for."

But the essential point which distinguished the case just cited from this at bar is that Wilson's contract is executory; he did not make tender or attempt to comply with his contract until long after the new act had gone into effect.

A somewhat similar case is that of *Waggoner vs. Flack* 188 U. S. 595, a Texas case. In that case, when Phillips purchased the land there was no provision for forfeiture in the statute itself. The Supreme Court of the state of Texas in *Fristoe vs. Blum* 92 Texas 76, had held that in the absence of statutory forfeiture the state might, like any other vendor under a forfeiture contract, secure a judicial forfeiture. Later the Texas legislature, by the act of 1897, provided for a forfeiture by the state auditor. This later act was complained of as a violation of the contract. The court says:

"Neither Phillips nor any of the successors to his title availed themselves of the opportunity to be judicially heard afforded by the law of 1897."

Again:

"The right to rescind the contract on the part of the state, upon the failure of the purchaser to pay as he had agreed, resided in the state at common law, as the supreme court of the state of Texas has held. *Fristoe vs. Blum.*"

"The act of 1897 simply provided a particular means by which such right might be enforced."

It will be observed that in both of these cases, the right of the purchaser was executory before the state changed the manner of the forfeiture. In each case the purchaser was bound to take notice of the new law. In each case he had ample time to come in and comply with his contract before a forfeiture was declared; in each case the purchaser ignored this right and determined to stand upon the old law; in each case the purchaser failed to make his tender until long after there had been a valid forfeiture declared under the new law. Therefore, I submit that these two cases have no application to the case at bar where the appellant, relying upon a statute still in existence, interpreted by a long line of decisions, completed his contract, paid his money and received his patent.

THE STATUTE OF 1879 WAS THE CONTRACT.

Again, in the case at bar, the statute of 1879 had pointed out and agreed with the school-land purchasers, just how their rights might be forfeited and not otherwise. This statute was written into the contract. It was the remedy provided by the contract. In *Walker vs. Whitehead* 16 Wall. 314 it is said:

"The laws which exist at the time and place of the making of a contract, and where it is to be performed, enter into and form a part of it. This embraces alike those which affect its validity, construction, discharge and enforcement.

"The ideas of validity and remedy, are inseparable, and both are parts of the obligation which is guaranteed by the Constitution against impairment.

"The States may change the remedy, provided no substantial right secured by the contract is impaired. Whenever such a result is produced by the Act in question, to that extent it is void."

In the case at bar the state bound itself to convey this land to Reitler whenever he complied with his part of the contract regardless of any default on his part unless predicated upon such default, his rights had been forfeited in the manner provided by law. No such forfeiture had occurred. That must be conceded. The state recognized this when it took his money and issued the patent. Having done this, can the state retro-actively change the remedy, validate a forfeiture, concededly void, and thus deprive him of the land which he has bought and to which the state has given him title?

A very similar case to the one at bar is *Pennoyer vs. McConnaughy* 140 U. S. 1. In that case one Owen had bought certain swamp lands in the state of Oregon, the appellee, having derived title from Owen. The lands were bought under the act of 1870; the purchaser was required to pay in twenty per centum of the purchase price as soon as the lands had been surveyed. In 1878 the law of 1870 was repealed with the further provision that all purchases should be void where the purchasers had not complied fully with the law of 1870, including payment of the twenty per centum of the purchase price. The state attempted to forfeit the appellee's rights. This court in its opinion, says:

'By the subsequent payment of the first installment

of the purchase price of the land embraced in his application, he acquired a vested right to those lands. In other words, by such payment, this contract with the state became so far executed as to be embraced in the class of contracts protected by section 10, article 1, of the constitution of the United States, which declares that 'no state shall pass any law impairing the obligation of contracts.'"

The court concludes the subsequent statute impairing the contract made with Owen is therefore void. In the case just cited the contract was executory; McConnaughy did not pay his twenty per centum until after the act of 1878 was passed but it was claimed that this was because of the state's delay in making the survey. However, this court held that the act of 1870 was written into Owen's contract and became a part thereof; that his contract could only be forfeited in the manner provided in the act of 1870, and that the act of 1878 in attempting to avoid this sale was unconstitutional and void.

The case at bar is stronger than this, for our contract was completed before any change in the statute. It will be conceded that the contract in the case at bar differs from the ordinary contract in that this contract depends upon legislation; is made up of the law itself, which is one of the elements of the contract.

The state, through its legislature, invites individuals to purchase its land. It provides, by statute, how the purchase may be effected and payments made and provides the remedy for a failure on the part of the purchaser to comply with the contract. The state of Kansas, by its

statute, the act of 1879, said to Reitler: "If you will buy this land at an appraised price you may pay one-twentieth down, the balance within twenty years with interest at six per cent and in addition, you shall pay the taxes. In case you fail to make these payments, the state of Kansas reserves the right to forfeit your purchase in a certain manner by a notice issued by the county clerk and served by the sheriff in a certain way, and no other; until such time as your right has been forfeited as provided by statute the state of Kansas will, at any time, receive the money due under the contract and execute to you a patent for the land."

This was the invitation of the state which Reitler accepted and if in an ordinary contract between individuals, the statute regulating such contract, is written therein, how much stronger is the case at bar, where the statute itself is part of the contract, binding upon the state of Kansas whenever accepted by any vendee of school-land? The officers who make these contracts on behalf of the state of Kansas perform purely ministerial functions. They may not vary in the slightest degree, the terms of the contract on the part of the state as expressed in the statute. The statute itself is the contract; the contract which binds the state and protects the purchaser. The state, for its remedies to enforce the contract, looks to the statute and the statute alone. The purchaser, to ascertain his rights, looks to the statute and the statute alone, so that this case is infinitely stronger than the ordinary contractual relations between individuals.

In *State ex rel. Brown et al vs. McPeak* 47 NW 691, the Supreme Court of the state of Nebraska had occasion to consider how far the legislature might disturb school-land contracts. The Nebraska statute provided that school lands might be leased for an annual rental of not less than six per cent upon the appraised value; that at the expiration of every five years there should be a new appraisement by three persons, one of whom was to be selected by the lessee. The legislature attempted to change this by depriving the lessee of the right to name one of the appraisers. The Nebraska Supreme Court held the change invalid as to existing contracts; that the school land law as it existed at the time of the contract, was written into and became a part thereof and could not subsequently be so changed as to lessen and impair the value of the contract.

In *State vs Commissioners* 4 Wis. 414 it was held that the provisions of the statute become a part of the contract between the purchaser of school land and the state and that it was not in the power of the legislature to pass a law which should alter or modify the rights of the purchaser.

The earliest case under this section of the constitution is that of *Fletcher vs. Peck* 6 Cranch 87. In that case it was said:

"When a law is in its nature, a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.

"A party to a contract cannot pronounce its own deed invalid, although that party be a sovereign state.

"A grant is a contract executed."

The opinion is by Chief Justice Marshall. After declaring that a grant from a state is a contract, a compact between two parties, that the party granting is estopped by his own grant, that all the considerations which affect the obligation of contracts as between private parties apply with equal force to contracts made by a state. It is further said:

"When, then, a law is in its nature a contract, when absolute rights have vested under that contract, a repeal of the law cannot divest those rights; and the act of annulling them, if legitimate, is rendered so by a power applicable to the case of every individual in the community."

In this case the law of 1879 was itself a contract, containing all the terms of the contract. To change the law is to change the contract.

In the case of *Sturges vs. Crowenshield* 4 Wheat. 122 it was held that a state bankruptcy act of the state of New York which permitted the discharge of the debtor upon the surrendering of his property, impaired the obligation of a contract created therefore, and was void under section 10 of article 1. In the same volume at page 517 the case of *Dartmouth College vs. Woodward,* laid down the rule that a charter is a contract which cannot be changed without the consent of the charter corporation. This doctrine has never been modified, except to the extent of holding that where "power is reserved by constitutional provision to alter or amend charters a corporation takes subject to this provision.

In *Green vs. Biddell* 8 Wheat. 1 the court uses the following language:

"The invalidity of a state law, as impairing the obligation of contracts, does not depend upon the extent of the change which the law effects in the contract.

"Any deviation from its terms, by postponing or accelerating the period of its performance, imposing conditions not expressed in the contract, or dispensing with the performance of those which are expressed, however minute or apparently immaterial in their effect upon the contract, impairs its obligation."

In the case at bar the state attempts to dispense with the performance of certain very important conditions, i. e., that the notice of forfeiture must be served, posted and returned in a certain way before the clerk may pronounce a lawful forfeiture.

In *Gelpecke et al vs. The City of Dubuque* 68 U. S. 175 the court held that bonds issued under a series of decisions of the Supreme Court of the state of Iowa interpreting a statute in a certain manner were not invalidated by a change in the view of the Supreme Court of Iowa reversing the earlier decisions and holding the bonds invalid.

"If the contract, when made, was valid by the laws of the state as then expounded and administered in its courts of justice, its validity and obligation cannot be impaired by any subsequent legislation or decision of its courts. The same principle applies where there is a change of judicial decision as to the constitutional power of the legislature to enact the law."

In our case, under the law of 1879 and the uniform course of Kansas' decisions, the attempted forfeiture of Reitler's

contract was void, his right to pay up the arrears and secure his patent was clear and neither the act of 1907 nor the subsequent decisions of that court can now avoid Reitler's patent.

In *Gunn vs. Barry* 15 Wall. 610 it is said:

"The legal remedies for the enforcement of a contract, which belong to it at the time and place where it is made, are a part of its obligation."

It further held that the obligation of a contract can no more be impaired by a constitutional provision than it can by the act of a legislature.

In *Davis, Governor, vs. Gray, Receiver,* 16 Wall. 203 it was held that the act of incorporation of a railroad and a land grant thereto were contracts within the protection of that clause of the constitution which we are considering. It was further held that when a state becomes a party to a contract the same rules of law are applied to it as to private persons under like circumstances.

In *United States ex rel. vs. City of Muscatine* it is held that where the settled decisions in relation to a statute, local in its character, have become rules of property, this court will follow such adjudications, and that this court will construe all contracts brought before it for consideration independent of that of the state courts which may have exercised their judgment upon the same subject. In other words this court is not bound, in considering the contract made by the state of Kansas with Reitler under the act of

1879 by the opinions of the Supreme Court of the state of Kansas.

In *The City of Chicago vs. Sheldon* 9 Wall. 50 it is said: "Where a contract is valid at the time, by the laws of the state, its legislature cannot pass an Act impairing its obligation, nor can any decision of its courts have that effect."

In *Edwards vs. Kearzey* 6 Otto. 595 it was held that the constitutional provision exempting from sale under execution, a homestead not exceeding in value, one thousand dollars, is invalid as regards contracts made before the adoption of the constitution; that the remedy subsisting when a contract is made is a part of its obligation which cannot be affected by any subsequent legislation that impairs or lessens the value of a contract. To the same effect see *City of Memphis vs. United States* 7 Otto. 293.

In *Douglas vs. Pike County, Missouri,* 11 Otto. 677, this court held that where a statute had been given different constructions by the Supreme Court of that state that this court will not follow the latest decisions if thereby contract rights which have accrued under earlier rulings would be injuriously affected; that this court would give the same effect to a change of judicial constructions in its operation on contracts and existing contract rights that will be given to a legislative amendment; that is to say, make it prospective but not retroactive; that the rights of the parties in regard to municipal bonds are to be determined according to the law as it was judicially con-

strued to be at the time. Applying that to the case at bar Reitler's rights are to be determined by the law as it existed and was judicially construed on the date that he paid his money and received his patent, September 26, 1906 and such rights cannot be injuriously affected either by subsequent legislation or a change of decisions.

To the same effect; *State of Louisiana vs. City of New Orleans,* 12 Otto 203 and *United States ex rel. vs. Mayor of the City of New Orleans* 13 Otto 358; *Poindexter vs. Greenhow* 144 U. S. 270.

In *Houston Etc. Company vs. Texas,* 177 U. S. 66 it was held that where the state of Texas had received in payment of an obligation treasury warrants which were void, and canceled them, that a subsequent statute which repudiated or permitted the repudiation of the payments was invalid and that a construction of such statute by the state court enforcing a cause of action on the obligation so satisfied operates to impair the obligation and therefore violated the Federal Constitution.

In *Muhlker vs. New York City and Harlem R. R. Co.* 197 U. S. 544, the question arose on the rights of an owner of real property abutting on a street in New York, to recover compensation for the easements of light, air and access impaired by the building of an elevated railroad in an adjoining street, such easements at the time the owner derived title being a part of his contract rights. A subsequent statute of the state of New York attempted to give such railroad company a right-of-way without compensation

to the owner of the property. This court held the statute invalid and unconstitutional under the section above cited.

The case at bar is not at all similar to the case of *White vs. Leovi* 174 U. S. 91. Although that case involved a conflict between two patents issued to different parties by the state of Louisiana. The Supreme Court of Louisiana held that the only question in the case was whether the two patents covered the same land, holding that if it did, the prior patent would control. This court held that the question involved, being merely one of surveys of duplicate areas no Federal question was involved.

The validity of the act of 1907 is defended on the ground that it merely changed a rule of evidence. Parties dealing with school land in Kansas have always dealt as they deal with other lands upon the faith of the public record of all transactions connected with the land. This has been the established rule for more than twenty-five years. As was said by the Supreme Court of the state of Kansas in *Knott vs. Tade, supra,* the notice and the return are jurisdictional. The right of the County Clerk to forfeit a school land entry depends upon the notice in the return, "to them any interested party may look to determine the status of the land."

Again in *Spencer vs. Smith, supra,* the Supreme Court of Kansas say "The basis of a forfeiture is the notice and the return of service; it rests upon written evidence of official action and is not left to the uncertain recollection of officers who may be asked eight years afterwards what

steps towards a forfeiture were in fact taken." Reitler was entitled to rest upon the official record. He was not required to seek the sheriff in some distant state and ascertain what he in fact did in the matter of service. Under a course of decisions running through twenty-five years he was entitled to, bound to, rely upon the public record and so relied and with the consent of the state of Kansas consummated his contract, paid out upon the land and secured his patent. The attempted change "in a rule of evidence" by the act of 1907 would make that evidence, which never was evidence before, would validate a forfeiture concededly void prior to January 25, 1907, when the act took effect and would destroy the rights of Reitler vested under the statute and decisions of the state of Kansas. The legislature may not so change the rules of evidence as to destroy such vested interest. I submit that the attempt to do so comes within the prohibition of the Federal Constitution and that the judgment of the Supreme Court of the state of Kansas in this case should be reversed.

All of which is respectfully submitted.

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